Supreme Court, U.S.
FILED
96 MAR 28 1996
OFFICE OF THE CLERK

No. 95-1568

In The

Supreme Court of the United States

October Term, 1995

ANN M. VENEMAN, Secretary, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; ISLAM SIDDIQUI, Assistant Director, CALIFORNIA DIVISION OF PLANT INDUSTRY; STATE OF CALIFORNIA,

Petitioners,

v.

PACIFIC MERCHANT SHIPPING ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney General
CHARLES W. GETZ IV
(Counsel of Record)
Assistant Attorney General
LINUS MASOUREDIS
Deputy Attorney General
50 Fremont Street, Suite 300
San Francisco, CA 94105-2239
Telephone: (415) 356-6348

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

178 pp

QUESTIONS PRESENTED

The State of California collects an agricultural pest inspection fee from certain marine vessels that are engaged in foreign commerce and that arrive in California from abroad. During the relevant time period, some of these fees were given to the United States Department of Agriculture ("USDA") so that USDA could enforce more thoroughly federal agricultural pest inspection and quarantine laws against vessels and other conveyances in foreign commerce entering California. The other portion of the fees was spent by the California Department of Food and Agriculture on a public information program to educate persons arriving in California from abroad about USDA pest inspection and quarantine laws.

California also conducts its own agricultural pest inspections of commercial trucks at State border stations which enforce State pest quarantines against interstate commerce. California, however, does not charge truckers a fee for these border inspections. The questions presented are:

1. Does California's collection of inspection fees from marine vessels engaged in foreign commerce but not from trucks engaged in interstate commerce violate the dormant Commerce Clause by facially discriminating against foreign commerce, as the California Supreme Court held, even though the fees were used to supplement federal pest regulation of foreign commerce?

2. Does California's collection of fees from marine vessels but not from trucks facially discriminate even though the two types of inspections are completely different in scope, cost and purpose?

PARTIES TO THE PROCEEDINGS

Petitioners herein are: Ann M. Veneman, Secretary of the California Department of Food and Agriculture; Islam Siddiqui, Assistant Director of the California Division of Plant Industry; the California Department of Food and Agriculture; the California Division of Plant Industry; and the State of California. Petitioner Veneman succeeded to the office of Secretary of the California Department of Food and Agriculture, replacing Henry Voss, who was a party-defendant in this action. All of petitioners, with the exception of Veneman, were defendants below.

Respondent herein, who was plaintiff below, is: the Pacific Merchant Shipping Association ("PMSA"), a California unincorporated association of ocean carriers.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE GRANTED	14
ARGUMENT	17
I. BECAUSE CONGRESS HAS APPROVED FEE "DISCRIMINATION" BETWEEN FOREIGN AND INTERSTATE COMMERCE, DORMANT COMMERCE CLAUSE RESTRAINTS DO NOT APPLY IN THIS CASE	17
II. THERE IS NO ECONOMIC PROTECTIONISM IN THIS CASE	22
III. BECAUSE THERE ARE MAJOR DIFFERENCES BETWEEN MARINE VESSEL AND TRUCK INSPECTIONS, THERE IS EITHER NO DISCRIMINATION OR A VALID JUSTIFICATION FOR DISCRIMINATION	25
IV. THIS COURT'S WASTE DISPOSAL PRECEDENTS ARE DISTINGUISHABLE AND INAPPLICABLE	28
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Alaska Airlines, Inc. v. Department of Food and Agriculture, 33 Cal.App.4th 506 (1995) 12

Barclays Bank PLC v. Franchise Tax Board of California, 114 S.Ct. 2268 (1994) 20

C & A Carbone, Inc. v. Town of Clarkstown, New York, 114 S.Ct. 1677 (1994) 22, 24

Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992) 13, 28, 29

Clark v. Paul Gray, Inc., 306 U.S. 583 (1939) 27

Evansville Airport v. Delta Airlines, 405 U.S. 707 (1972) 25, 27

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 23

Itel Containers International Corp. v. Huddleston, 507 U.S. 60 (1993) 21

Kraft General Foods, Inc. v. Iowa Dept. of Revenue, 505 U.S. 71 (1992) 24

Maine v. Taylor, 477 U.S. 131 (1986) 20

McLean v. Denver & Rio Grande Railroad Co., 203 U.S. 38 (1906) 27

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 18, 21, 22

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 23

Northwest Airlines, Inc. v. County of Kent, Michigan, 114 S.Ct. 855 (1994) 27

TABLE OF AUTHORITIES – Continued

Page

Oregon Waste Systems v. Dept. of Environmental Quality, 114 S.Ct. 1345 (1994) 13, 28, 29, 30

Pacific Merchant Shipping Assn. v. Voss, 12 Cal.4th 503 (1995) 1, 12, 26, 29

Pacific Merchant Shipping Assn. v. Voss, 36 Cal.App.4th 212 (1995) 1, 12

Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) 17

Pure Oil Co. v. State of Minnesota, 248 U.S. 158 (1918) 27

South-Central Timber Development v. Wunnicke, 467 U.S. 82 (1984) 20, 24

Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1 (1986) 18, 21, 22

West Lynn Creamery, Inc. v. Healy, 114 S.Ct. 2205 (1994) 22

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, section 8, cl. 3 (Commerce Clause) 1

STATUTES

1992 Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, Pub. L. 102-142, 105 Stat. 886 18

Anti-Head Tax Act, 49 U.S.C. section 1513 12

TABLE OF AUTHORITIES – Continued

Page

Federal Plant Pest Act, 7 U.S.C. sections 150aa et seq. 3

Plant Quarantine Act of 1912, 7 U.S.C. sections 151 et seq. 3

7 United States Code

§147a(a) 4

§147a(e) 3

§148 4

§149 3

§150dd 3

§150ee 3

§150ff 3

§156 3

§160 3

§450 ..... 4, 20

21 United States Code

§136a 18, 19, 20

§136a(a)(1)(A) 2

§136a(a)(1)(B), (C) 19

§136a(a)(1)(D) 19

§136a(a) 3

28 United States Code

§1257(a) 1

TABLE OF AUTHORITIES – Continued

Page

California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act, Cal. Stats. 1990, ch. 1612, Cal. Food and Agriculture Code sections 5350-5353 2

§5350(a) 5

§5350(b) 5

§5350(c) 5, 7

§5350(d) 6

§5351 6

§5352 ..... 5, 6, 7

§5353(a) 6, 7

§5353(b) 1, 6

§5353(e) 6

§5353(f) 6

§5353(g) 6

Cal. Food and Agriculture Code

§403 10

§5322 10

TABLE OF AUTHORITIES – Continued

Page

§5341 10

§5341.5 10

Cal. Stats. 1899, c. 76, pp. 91-92 10

Cal. Stats. 1907, c. 436, pp. 798-799, sections 2319b-e 10

Cal. Stats. 1933, c. 25, p. 63, section 30 10

REGULATIONS

7 C.F.R. Part 319 3

7 C.F.R.

§330.105 3

§354.3 4

§354.3(b)(1) 4

§354.3(c)(1) 4

§354.3(d)(1) 4

§354.3(e)(1) 4

§354.3(f)(1) 4

3 Cal. Code Regs. sections 3152-59 10

OTHER AUTHORITIES

56 Fed. Reg. 14837, 14839 (1991) 4

TABLE OF AUTHORITIES – Continued

Page

57 Fed. Reg. (1992)

pp. 755, 762 9

pp. 14475 18

pp. 14498, 14499 18

61 Fed Reg. 2660, 2662 (1996)..... 18

Ribble, *State and National Power Over Commerce* 211 (1937) 17

Plant Quarantines in California, University of California, Division of Agricultural Sciences (September 1969) pp. 9, 18..... 11

California Department of Food and Agriculture, *The First 100 Years* (December 1980)..... 11

PETITION FOR WRIT OF CERTIORARI

Petitioners, Ann M. Veneman, et al. respectfully petition this Court for a writ of certiorari to review the judgment of the California Supreme Court in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal, Third Appellate District (App. 43-65) is reported at 36 Cal.App.4th 212 (1995). The opinion of the California Supreme Court (App. 1-42) is reported at 12 Cal.4th 503 (1995).

JURISDICTION

The opinion and judgment of the California Supreme Court was issued on December 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the U.S. Constitution, Art. I, section 8, cl. 3, provides, in pertinent part, that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States".

Cal. Food and Agriculture Code section 5353(b) – which is the marine vessel fee provision invalidated in this case – provides as follows:

> "Each commercial marine carrier engaged in foreign commerce which carries animals or plants or other materials which are or likely to be, infected or infested with any pest shall pay a fee of two hundred dollars ($200) to the director [of the California Department of Food and Agriculture] upon the initial arrival in this state of the carrier on a voyage which originated outside the United States from a country identified and listed by the director pursuant to section 5352, or which made an intermediate stop on that voyage in a country identified and listed by the director pursuant to Section 5352."

Other relevant provisions of the California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act, Cal. Stats. 1990, ch. 1612, Cal. Food and Agriculture Code sections 5350-5353, (hereinafter "the California Inspection Act") are reprinted in the Appendix.

21 U.S.C. section 136a(a)(1)(A) authorizes the United States Department of Agriculture ("USDA") to collect fees for agricultural pest inspection of foreign commerce, and provides, in pertinent part:

> "The Secretary of Agriculture . . . may prescribe and collect fees to cover the cost of providing agricultural quarantine and inspection services in connection with the arrival at a port in the customs territory of the United States, or the preclearance or preinspection at a site outside the customs territory of the United States, of an international passenger, commercial vessel, commercial aircraft, commercial truck, or railroad car."

Other relevant provisions of federal law which authorize USDA to conduct agricultural pest inspections, and to

cooperate with States in controlling agricultural pests are reprinted in the Appendix.

The Reimbursable Cooperative Agreement between USDA and the California Department of Food and Agriculture, under which the State transferred marine vessel fees to USDA for USDA enforcement of federal inspection and quarantine laws, is also reprinted in the Appendix.

STATEMENT OF THE CASE

1. The USDA implements an extensive regulatory program to prevent the introduction into the United States of agricultural pests from foreign countries. Pursuant to the Plant Quarantine Act of 1912, 7 U.S.C. sections 151 et seq. and the Federal Plant Pest Act, 7 U.S.C. sections 150aa et seq., the USDA imposes agricultural pest quarantines on articles and conveyances in foreign commerce. 7 U.S.C. sections 160, 150dd. These federal quarantines apply to numerous products from specified countries or regions, and cover thousands of agricultural pests found outside the United States. See 7 C.F.R. Part 319 (Foreign Quarantine Notices).

The USDA inspects goods and conveyances in foreign commerce to enforce these quarantines. 7 U.S.C. sections 150ee, 150ff, 156; 7 C.F.R. section 330.105; see also 7 U.S.C. section 147a(e); 7 U.S.C. section 149.

The USDA funds its agricultural quarantine and inspection ("AQI") services by collecting "user" fees from the owners or operators of the conveyances subject to inspection. 21 U.S.C. section 136a(a). By regulation, these

AQI user fees vary for different classes or categories of foreign commerce. See 7 C.F.R. section 354.3.[1] The purpose and effect of AQI user fees is to "shift[] the financial support for certain AQI activities from the general taxpayer to identifiable recipients of these services." 56 Fed. Reg. 14837, 14839 (1991) (Final Rule on AQI User Fees).

The USDA is authorized to cooperate with State agricultural departments in controlling agricultural pests. For example, 7 U.S.C. section 450 provides, in pertinent part, that:

> "in administration of Federal . . . laws and regulations relating to . . . the control or eradication of plant and animal diseases and pests, the Secretary of Agriculture is authorized . . . to enter into cooperative arrangements with State departments of agriculture and other State agencies charged with the administration and enforcement of such State laws and regulations and to provide that any such State agency which has adequate facilities, personnel, and procedures, as determined by the Secretary, may assist the Secretary in the administration and enforcement of such Federal laws and regulations to the extent and in the manner he deems appropriate in the public interest."

See also 7 U.S.C. section 147a(a); 7 U.S.C. section 148.

---

[1] Current USDA AQI user fees are $369.50 for commercial vessels of 100 net tons or more, 7 C.F.R. section 354.3(b)(1); $2 for each commercial truck, *id.*, section 354.3(c)(1); $7 for each railroad car, *id.*, section 354.3(d)(1); $61 for each commercial aircraft, *id.*, section 354.3(e)(1); and $1.45 for each passenger aboard an international aircraft flight, *id.*, section 354.3(f)(1).

2. The California Inspection Act was enacted in 1990 to supplement USDA's agricultural pest regulation of foreign commerce. App. 128-129, ¶12. USDA has never had sufficient personnel to inspect every conveyance entering California from abroad. App. 96, ¶9; 122, ¶4; 132, ¶6. With the expansion of Pacific Rim trade and without a concomitant increase in the USDA budget, the State was worried that a smaller and smaller percentage of foreign commerce entering California was actually being inspected by USDA. App. 94-95, ¶3; 129, ¶12. The 1989-90 medfly infestation in California had cost $62 million to eradicate. App. 95, ¶5. Consequently, the State Legislature wanted to intensify efforts at excluding pests from initial entry into the State to avoid later and more costly eradication efforts once pests had become established. App. 95, ¶¶4-5; 113-115.

The California Inspection Act authorizes the California Department of Food and Agriculture ("CDFA") to "establish a program for the inspection of conveyances entering California through airport and maritime facilities to prevent the introduction into, or the spread within, this state of pests." Cal. Food and Agriculture Code section 5350(a). The California Inspection Act also authorizes CDFA to (1) maintain plant quarantine inspection stations at airports and marine terminals, *id.*, section 5350(b); (2) establish an informational program at such points of entry to provide users of the entry facilities with information about pest control and quarantine requirements, *id.*, section 5350(c); and (3) identify and establish a list of countries which are believed to be a potential source of exotic plant and animal pests, *id.*, section 5352.

Section 5353(b) – which is the provision of the Act in dispute – authorizes CDFA to charge commercial marine vessels an inspection fee if the vessel departed from or made a stop in a country listed under section 5352 as a potential source of exotic pests. The marine vessel inspection fees may be levied only "[t]o the extent permitted by federal law." *Id.*, section 5352. Similar inspection fees (which are not at issue in this case) are also authorized for air carriers engaged in foreign commerce. See Sections 5351, 5353(a).

The inspection fees collected under the California Inspection Act are to be used solely to implement California Inspection Act programs and activities. *Id.*, section 5353(e). The inspection fees can be revised either upward or downward, depending upon whether the revenue generated by the fees is either insufficient or in excess of the amount needed to conduct an effective inspection program. *Id.*, section 5353(f). CDFA also can exempt vessels or aircraft from inspection requirements if the vessels or aircraft already have been inspected outside the State. *Id.*, section 5350(d).

The California Inspection Act also allows CDFA to "contract with federal . . . agencies . . . to assist the [CDFA] in carrying out the purposes of this section and Section 5350." *Id.*, section 5353(g).

3. To accommodate industry concerns about dual regulation, minimize burdens on foreign commerce, and avoid potential conflicts with federal regulation, CDFA implemented the California Inspection Act in a limited manner. App. 96-97, ¶10; 127, ¶7; 128, ¶11; 132, ¶5. First, the State has *not* established any separate State quarantines against

foreign commerce. App. 127, ¶8. The State has acknowledged in this litigation that it is preempted from establishing State quarantines against foreign commerce which conflict with federal quarantines. App. 98, ¶13. Second, the list of foreign countries harboring exotic pests that CDFA was authorized to prepare under Cal. Food and Agriculture Code section 5352 was derived from the federal quarantine list, and drawn up in coordination with USDA personnel. Consequently, only vessels coming from foreign ports on the federal quarantine list are subject to the State's inspection fee. App. 96, ¶7. Third, while the State has set up and staffed its own quarantine inspection stations at some airports and marine terminals, it has not established a separate inspection program. App. 126-127, ¶7. Instead, the State has implemented the California Inspection Act by collecting agricultural pest inspection fees from air and marine carriers engaged in foreign commerce which enter the State, as is authorized by Cal. Food and Agriculture Code sections 5353(a) and (b). During the relevant time period, these fees were spent mainly in two ways: (1) a portion of the money was transferred to USDA to augment USDA's federal pest inspections and quarantine enforcement in California; and (2) the other portion of the fees was used by CDFA for the public information program authorized by Cal. Food and Agriculture Code section 5350(c), and to allow "blitzes", i.e., intense inspections, using State and federal inspectors.

The transfer of inspection fees from the State to USDA was formalized in a Reimbursable Cooperative Agreement ("RCA") which CDFA and USDA entered into in 1991. App. 97, ¶11; 106-113; 121, ¶2. The RCA makes

clear that the California Inspection Act fees transferred to USDA were used to augment federal enforcement of federal inspection and quarantine laws, not state quarantine requirements. App. 107-108, 114. As a result of receiving these fees, USDA was able to hire seven additional marine and forty-four additional airport inspectors. App. 4. Even with this additional staffing, USDA does not inspect every vessel entering California. App. 96, ¶9; 122, ¶4; 132, ¶6. Consequently, inspectors periodically conduct "blitzes" whereby an intensive inspection effort is concentrated at a particular California port of entry for a brief period of time. App. 96, ¶9; 101-105; 134, ¶10.

The public information program funded by inspection fees seeks to inform passengers and the crew of vessels and aircraft entering California of pest dangers and federal quarantine requirements. App. 133-134, ¶9. For example, passengers on cruise ships returning from Mexico often bring back fresh fruit unaware of federal quarantines against fresh produce. App. 103. Because not every ship or conveyance can be inspected, education programs must be utilized to encourage voluntary compliance with federal quarantine laws.

In 1992-93, CDFA collected approximately $4.3 million in fees under the California Inspection Act which was spent as follows: 55% for inspections; 23% for the public information program; 15.2% for administration and operations; 3.7% for investigation, and 2.3% for blitzes. App. 8; 133, ¶8. All of the monies collected as fees were spent on pest inspection and prevention programs; none of the money was transferred to the State's general fund for use in other programs. App. 99-100, ¶19; 134, ¶11.

According to USDA, shippers who must pay both the California Inspection Act fee and the USDA AQI user fee are not being subjected to duplicate fees or "double-billing". See 57 Fed. Reg. 755, 762 (1992). When USDA calculates its user fee, it does not include in the rate base for its fee the costs of the additional USDA inspectors who are funded by California's fees. *Id.* Consequently, the California and USDA fees are not duplicative but fund different portions of the USDA inspection program.

Shippers can be exempted from California Inspection Act fees in several ways. If a vessel has been inspected by USDA at an earlier port of entry into the United States, the vessel is exempt from California's inspection fee. App. 98-99, ¶¶15, 16; 135, ¶12. Shipments from Hawaii, Guam and Puerto Rico are also exempt from the California fee because USDA has inspection programs for these areas. App. 98, ¶14. If a shipper can establish that the commodities onboard a vessel pose no risk to California, or that the commodities do not originate from a port on the federal quarantine list, no fees are required. App. 135, ¶12.

In 1994, CDFA decided that USDA funding had improved such that the State no longer needed to transfer inspection fees to USDA to augment USDA's inspection program. App. 7. Consequently, the State discontinued its funding of USDA inspections, and reduced its California Inspection Act fee from $200 to $100 for vessels. *Id.* These reduced inspection fees are now used for CDFA's public education and information program, and for oversight

and coordination with USDA on federal inspections and investigations of smuggling.[2] *Id.*

4. Since the 1920s, California has conducted state border inspections to exclude entry into the State of agricultural pests from other States.[3] There are 16 state-run agricultural inspection stations along California's border which enforce 37 state quarantines against pests found in other parts of the United States. See 3 Cal. Code Regs. sections 3152-59. App. 125-126, ¶3. These state quarantines differ from USDA foreign quarantines in that the latter exclude pests found outside the United States. The state border inspections do not generally enforce USDA foreign quarantines because it is assumed that any foreign commerce entering California from another State

---

[2] Because Respondent seeks refund of the marine vessel fees that were collected before 1994 and transferred to USDA, the validity of those fees is not moot. Further, California may wish to raise the fees and increase inspections in the future as needs dictate.

[3] The current authority for border inspections resides mainly in Cal. Food and Agriculture Code sections 403 (authorizing CDFA to prevent the introduction and spread of animal pests and plant diseases into the State), section 5322 (authorizing CDFA to establish quarantines), section 5341 (authorizing establishment of plant quarantine inspection stations) and section 5341.5 (requiring inspections and a certificate of inspection for motor vehicles entering the State with agricultural commodities). However, predecessor legislation authorizing inspections and quarantines dates back almost a hundred years. See Cal. Stats. 1899, c. 76, pp. 91-92; Cal. Stats. 1907, c. 436, pp. 798-799, sections 2319b-e; Cal. Stats. 1933, c. 25, p. 63, section 30.

was already inspected by USDA when the products first entered the United States. *Id.*[4]

The main focus of the border inspection effort is on commercial trucks, although inspectors have authority to inspect any vehicle entering the State.[5] Approximately 280,000 commercial trucks are inspected each year. *Id.* These inspections take between five to thirty minutes to complete. App. 126, ¶5. CDFA does not charge truckers a fee for routine border inspections; however, if special services like fumigation are provided, fees are charged. App. 8, n.6. The State currently pays for border inspections from its general fund, and has done so for decades, long before the California Inspection Act was enacted. The cost of the border inspections as of 1992 was approximately $8.4 million per year. App. 9.

5. Respondent PMSA filed suit shortly after the California Inspection Act was enacted, contending, *inter alia*, that the collection of inspection fees from marine carriers

---

[4] If, however, foreign quarantined pests are discovered at a state border inspection station, CDFA would take steps to exclude the pests from entry into the State. App. 125-126, ¶3.

[5] While commercial trucks are now the main focus of border inspections, private automobiles were a significant pest pathway when border stations were first established in the 1920s. At that time, alfalfa fields in neighboring Nevada were infested with the alfalfa weevil. Automobile travellers (who were more likely then to camp by the roadside rather than stay in motels) could carry weevils in camping equipment and bedrolls. See *Plant Quarantines in California*, University of California, Division of Agricultural Sciences (September 1969) pp. 9, 18; California Department of Food and Agriculture, *The First 100 Years* (December 1980).

under the Act imposed a discriminatory and unreasonable burden on foreign commerce in violation of the dormant Commerce Clause.[6] The trial court granted PMSA summary judgment, and held that the California Inspection Act discriminated on its face against foreign commerce because no comparable fees were imposed for interstate commerce inspections of trucks at California border stations.

The California Court of Appeal reversed on the ground that there was a triable issue of fact whether the marine vessel and truck inspections were sufficiently similar and could be validly compared for purposes of assessing discrimination under the Commerce Clause. See *Pacific Merchant Shipping Assn. v. Voss*, 36 Cal.App.4th 212 (1995).

The California Supreme Court, in turn, reversed, and held that the marine vessel fee provisions of the California Inspection Act unjustifiably discriminated on their face against foreign commerce. *Pacific Merchant Shipping Assn. v. Voss*, 12 Cal.4th 503 (1995). The California Supreme Court acknowledged that the alleged fee "discrimination" did not benefit in-state commerce or any other parochial California economic interest. App. 17-18. Nonetheless, the court thought that this Court's decisions

---

[6] Certain air carriers also filed suit challenging the aircraft inspection fees imposed under the California Inspection Act. The aircraft fees have been upheld against a challenge that they are preempted by the Anti-Head Tax Act, 49 U.S.C. section 1513. See *Alaska Airlines, Inc. v. Department of Food and Agriculture* 33 Cal.App.4th 506 (1995). That case is now final as to the parties on that issue, but remains active on the same issue raised herein.

in *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992) and *Oregon Waste Systems v. Dept. of Environmental Quality*, 114 S.Ct. 1345 (1994) "require[] us to conclude that the provisions [of the California Inspection Act] facially discriminate against foreign commerce." *Id.* at 19. The court reasoned that because this Court's waste disposal cases had held that imposing higher fees for the disposal of out-of-state waste than for in-state waste constituted Commerce Clause discrimination, California's imposition of inspection fees upon marine vessels in foreign commerce but not upon trucks in interstate commerce constituted similar proscribed discrimination. *Id.* at 19-23.

The California Supreme Court also rejected the Court of Appeal's determination that a triable issue of fact existed as to whether vessel and truck inspections were "substantially similar" for purposes of Commerce Clause discrimination. *Id.* at 23-25. The court doubted that a "substantially similar" requirement applied outside the tax context, *id.* at 26, and thought that differences in the time and cost of the inspections, or the type and danger of the pests targeted, were not significant. *Id.* at 30-32. The fact that USDA used a portion of the inspection fees for its enforcement of federal law also was "without significance," according to the court. *Id.* at 24.

The California Supreme Court also held that California's fee discrimination was not justified by a legitimate local purpose. *Id.* at 32-37. Although excluding pests was a legitimate local purpose, the court thought there was no justification for imposing fees on foreign but not interstate commerce. The fact that vessel inspections were more time-consuming and targeted more dangerous pests

might justify a *different fee scale*, according to the court, but could not justify charging *no fee at all* for truck inspections at border stations. *Id.* at 35-36.

The court also thought that there were two nondiscriminatory alternatives available to the Legislature: either (1) remove the fee for vessel inspections so that all inspections are funded by the State, or (2) impose fees for State border inspections like the fees imposed upon vessels. *Id.* at 37. The State's argument that public revenues to fund foreign commerce inspections were not available, *id.* at 37-38, and that collecting fees from each truck passing through California's border stations would snarl traffic and cause excessive administrative collection burdens were rejected. *Id.* at 39-40.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. The California Supreme Court's use of the concept of "discrimination" under the dormant Commerce Clause was overly simplistic and mechanical. The California court saw different treatment of vessels in foreign commerce and trucks in interstate commerce, and concluded that the Commerce Clause had been violated. The court failed to appreciate three key factual characteristics of this case which ensure that any fee "discrimination" passes muster under the dormant Commerce Clause.

First, Congressional regulation of agricultural pests in foreign commerce is not "dormant." Congress has not only authorized USDA to conduct agricultural pest inspections of foreign commerce, but it has authorized

the imposition of federal inspection fees upon foreign commerce. Because no comparable federal inspection fees are imposed upon interstate commerce, Congress has approved or sanctioned the very fee "discrimination" between foreign and interstate commerce which the California Supreme Court thought violated the dormant Commerce Clause.

Second, there is no hint in this case of economic protectionism, or any attempt by the State to benefit in-state economic interests at the expense of out-of-state competitors. The shippers of foreign commerce that are subject to the California Inspection Act fee include both California and out-of-state businesses. Consequently, the burden of the alleged "discriminatory" fee falls on in-state economic interests just as much as on out-of-state interests. The commerce that is supposedly benefited by not having to pay the California inspection fee is not in-state commerce but out-of-state commerce which is inspected by the State free of charge at the State's borders. The State's taxpayers subsidize this benefit to out-of-state producers. Consequently, the alleged "discrimination" in this case amounts to: (1) in-state interests, i.e., the State's taxpayers, subsidizing inspections of out-of-state commerce which seeks to enter the State, (2) which thereby "discriminates" against shippers engaged in foreign commerce who pay an inspection fee but who include both in-state and out-of-state businesses. At worst, this "discrimination" makes access to California markets cheaper for interstate commerce than for foreign commerce (which improves the competitive position of out-of-state producers vis-a-vis in-state producers). But

Congress already imposes this same type of fee "discrimination" between foreign and interstate commerce under federal law so there is nothing "suspect" about this type of discrimination under the dormant Commerce Clause.

Third, the conclusion that the State has discriminated between foreign and interstate commerce is predicated on the notion that the inspections for these two streams of commerce are comparable. They are not. State border inspections of trucks enforce different quarantines, target different pests and commodities, take much less time to conduct, and are less costly than inspections of marine vessels. Moreover, there are valid non-protectionist reasons for not charging fees for border inspections. These include the administrative burden of collecting small fees for the high volume of trucks being inspected, and the potential disruption of traffic at border stations if fees are collected. Consequently, the California Supreme Court should have held either that:

> (1) the State's collection of inspection fees from marine vessels was not subject to dormant Commerce Clause scrutiny because: (a) the State's fee collection is consistent with, and implicitly authorized by, federal regulation of agricultural pests in foreign commerce; and, (b) no economic protectionism taints the State's fee collection; or,
>
> (2) if dormant Commerce Clause scrutiny applies, the State has valid non-protectionist reasons for collecting inspection fees from marine vessels engaged in foreign commerce, but not from commercial trucks engaged in interstate commerce.

2. The second main reason why this Court should grant review is to clarify dormant Commerce Clause principles in the context of cooperative federal-state regulation, like that in this case. There is a long history of federal-state cooperation in the area of agricultural pest eradication and control. In this case, State fees were used to fund USDA pest inspections of foreign commerce. There may be future instances of federal-state cooperation prompted by shortfalls in the budget of one sovereign or the other, or for reasons of economic or bureaucratic efficiency. This Court should clarify whether and to what extent the dormant Commerce Clause stands in the way of such federal-state cooperation. As the Court said in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 439 (1946): "It would be a shocking thing, if state and federal governments acting together were prevented from achieving the end desired by both, simply because of the division of power between them." quoting Ribble, *State and National Power Over Commerce* 211 (1937). If left unreviewed, the California Supreme Court's decision may cast a dormant Commerce Clause cloud over future federal-state cooperation.

ARGUMENT

I. BECAUSE CONGRESS HAS APPROVED FEE "DISCRIMINATION" BETWEEN FOREIGN AND INTERSTATE COMMERCE, DORMANT COMMERCE CLAUSE RESTRAINTS DO NOT APPLY IN THIS CASE

The dormant Commerce Clause imposes restraints on state action only "when Congress has not acted or

purported to act." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). "Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce". *Id.* See also *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 12 (1986).

Here, "we do not confront federal governmental silence of the sort that triggers dormant Commerce Clause analysis." *Wardair, supra*, 477 U.S. at 9. Instead, Congress has authorized both the imposition of AQI inspection fees upon foreign commerce, and cooperation between USDA and States in pest control efforts. Significantly, Congress has not imposed comparable AQI inspection fees upon *interstate* commerce.[7] Consequently, Congress has approved the very fee "discrimination" between interstate and foreign commerce which the California Supreme Court found to be impermissible under the dormant Commerce Clause.

21 U.S.C. section 136a, which authorizes AQI inspection fees, does not place any maximum dollar cap on the

---

[7] The 1992 Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, Pub. L. 102-142, 105 Stat. 886, barred USDA from collecting AQI user fees from "domestic" commerce between Puerto Rico and Hawaii, and the mainland United States. Because of this legislation, USDA withdrew proposed regulations for AQI user fees for such domestic or interstate commerce. See 57 Fed. Reg. 14498, 14499 (1992); 57 Fed. Reg. 14475 (1992). See also 61 Fed Reg. 2660, 2662 (1996) ("We do not have user fees for domestic programs. User fees apply only to import and export services.").

amount of marine vessel fees that may be collected.[8] Nor does that statute indicate that USDA's collection of AQI fees is intended to be exclusive. The only statutory requirement for inspection fees is that they be reasonably "commensurate with the costs of agricultural quarantine and inspection services with respect to the class or persons or entities paying the fees." 21 U.S.C. section 136a(a)(1)(D). Because USDA has concluded that California's inspection fee is not duplicative of USDA's inspection fee, but instead funds additional USDA AQI services, see supra, p.9, California's fee satisfies the "commensurability" requirement of 21 U.S.C. section 136a(a)(1)(D).

In sum, the indicia of federal approval of the State's inspection fee includes the following:

> (1) Congress had expressly authorized federally-imposed inspection fees upon shippers of foreign commerce for AQI services under 21 U.S.C. section 136a;
>
> (2) Congress has approved the "discriminatory" imposition of inspection fees upon shippers in foreign commerce shippers because comparable AQI fees may not be imposed upon shippers engaged in interstate commerce under federal law;
>
> (3) Congress has refrained from setting any maximum cap on the amount of AQI fees that may be imposed upon marine vessels, and has

---

[8] There were maximum caps on the amount of inspection fees that could be collected for airport, commercial truck, and railroad car inspections for Fiscal Years 1992 and 1993, but no such cap was enacted for marine vessel fees. See 21 U.S.C. sections 136a(a)(1)(B), (C).

only required in 21 U.S.C. section 136a that fees be commensurate with the cost of AQI services;

(4) Congress has expressly authorized USDA to cooperate with States in agricultural pest control in several statutes, including 7 U.S.C. section 450; and,

(5) USDA entered into a cooperative agreement with California pursuant to 7 U.S.C. section 450, whereby California transferred a portion of its inspection fees to USDA for USDA AQI enforcement.

This level of federal authorization or approval should eliminate any dormant Commerce Clause scrutiny in this case. When a State discriminates against interstate commerce, Congressional authorization of such discrimination and economic protectionism must be "unmistakably clear." *South-Central Timber Development v. Wunnicke*, 467 U.S. 82, 92 (1984); *Maine v. Taylor*, 477 U.S. 131, 139 (1986). However, this "clear statement" rule does not apply to State regulation of foreign commerce when the state regulation is untainted by any economic protectionism. See *Barclays Bank PLC v. Franchise Tax Board of California*, 114 S.Ct. 2268, 2282-2283 (1994) ("Congress may *more passively indicate* that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential,' *Japan Line*, 441 U.S. at 448, 99 S.Ct. at 1821; *it need not convey its intent with the unmistakable clarity* required to permit state regulation that *discriminates against interstate commerce*"). (Emphasis added).

The reason why a lesser standard of Congressional authorization applies in this context is because of the different Commerce Clause principles implicated. The

core Commerce Clause concern about economic protectionism applies to interstate not foreign commerce: the Framers contemplated a domestic "free trade" regime, but not an international one. In contrast, when a State regulates foreign commerce without any taint of economic protectionism, the relevant Commerce Clause concern is whether state regulation impairs the United States' conduct of foreign relations and its ability to "speak with one voice" in foreign affairs. See *Wardair, supra*, 477 U.S. at 8; *Itel Containers International Corp. v. Huddleston*, 507 U.S. 60, 74-75 (1993). The Federal Executive's foreign affairs responsibilities place it in a position to assist the Court in evaluating the impact of state regulation upon the Nation's foreign affairs interests. *Itel Containers, supra*, 507 U.S. at 75-76. Consequently, a lesser standard of Congressional intent or approval applies to state regulation of foreign commerce untainted by economic protectionism because of the different Commerce Clause principles implicated.

Here, the fact that USDA entered into a cooperative agreement with the State, and spent a major portion of the inspection fees collected by the State should be a clear indication that California's inspection fee did not impair the federal government's foreign affairs interests. If the State's fee had threatened any foreign affairs interest, USDA presumably would not have entered into the cooperative agreement which contemplated the imposition of State fees upon foreign commerce. USDA's actions are analogous to the Secretary of the Interior's approval of the tribal taxing ordinance in *Merrion v. Jicarilla Apache Tribe, supra*, 455 U.S. 130, 155-156, which removed the ordinance from dormant Commerce Clause scrutiny even

though there was no express Congressional indication that Indian taxes were immune from dormant Commerce Clause scrutiny. *Id.* at 155, n. 21. Here, as in *Wardair, supra*, "[i]t would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow." 477 U.S. at 12. (Emphasis in original).

II. THERE IS NO ECONOMIC PROTECTIONISM IN THIS CASE

The main evil which the Commerce Clause seeks to combat is economic protectionism, i.e., state efforts to economically benefit in-state interests at the expense of out-of-state competitors. See e.g., *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 114 S.Ct. 1677, 1682 (1994); *West Lynn Creamery, Inc. v. Healy*, 114 S.Ct. 2205, 2211 (1994). There is no hint of economic protectionism in this case. First, the State's inspection fees falls on shippers engaged in foreign commerce. Because those shippers include California businesses as well as out-of-state businesses, App. 96, ¶8; 136, ¶13; CT 650-671 (list of class action members), the fee burden falls on in-state interests just as much as on out-of-state interests.

Second, the commerce that is supposedly benefited by the State's "discriminatory" fee is not in-state commerce, but out-of-state or interstate commerce which is inspected free of charge at California border stations. California's taxpayers subsidize these border inspections thereby improving the competitive position of out-of-state producers vis-a-vis in-state producers. If a State can legitimately subsidize in-state industry under the market

participant doctrine, and provide in-state commercial interests an advantage over out-of-state competitors, see *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-810 (1976); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988), then the State's taxpayers should be able to subsidize inspections for *out-of-state* commerce, which should be, *a fortiori*, less suspect under the dormant Commerce Clause.

Third, assuming that shippers of foreign commerce pass on the costs of the State's inspection fee to foreign producers, the worst effect that California's fee has is to make access to California markets cheaper for interstate commerce over foreign commerce.[9] However, federal law *already* imposes this same discrimination in favor of interstate over foreign commerce.

Fourth, the inspection fees collected by the State are used entirely for the California Inspection Act program, and are not added to the general fund for other governmental programs. Consequently, the inspection fee is not being used as a general revenue raising device.

The process-based explanation for dormant Commerce Clause vigilance is that courts should look carefully when the burden of state regulation falls entirely on out-of-state interests that are unrepresented in the local

---

[9] It is not clear that the products that are being shipped in foreign commerce and that are subject to inspection fees are in competition with the products carried by commercial truckers which are not subject to fees. If the State subsidizes inspection fees for certain products which are *not* in competition with other products that pay an inspection fee, then any fee "discrimination" has no relevant economic impact for Commerce Clause purposes.

legislative process. See e.g., *South-Central Timber Development, supra,* 467 U.S. at 92; *C & A Carbone, Inc, supra,* 114 S.Ct. at 1689 (O'Connor, J., concurring). However, because the bite of California's fee falls on major in-state interests, i.e, California taxpayers and California shippers engaged in foreign commerce, any process-based concerns are absent.

Discrimination against foreign commerce may still violate the Commerce Clause even if in-state interests are not benefitted by the discrimination. See *Kraft General Foods, Inc. v. Iowa Dept. of Revenue,* 505 U.S. 71, 79 (1992). But the reason for this is not because the Commerce Clause mandates an *international* free trade regime like the national free trade regime contemplated by the Framers, but because of the foreign affairs implications of such state discrimination, including possible foreign retaliation. See *Kraft, supra.* Here, however, there are no adverse foreign affairs implications because the federal government has already spoken on the issue. Congress has decided to charge foreign commerce but not interstate commerce for agricultural pest inspections. The State in this case is merely providing additional money to USDA for foreign commerce inspections, and it is raising this money in the way that Congress has already approved, namely, by collecting inspection fees from shippers of foreign commerce.

Consequently, none of the Commerce Clause discrimination rationales apply in this case:

> (1) there is no economic protectionism, and no attempt to benefit in-state interests at the expense of out-of-state competitors;

(2) there is no process-based concern about economic burdens falling exclusively on unrepresented out-of-state interests; and,

(3) there are no foreign affairs concerns because Congress has already decided that shippers in foreign commerce should pay the very type of inspection fee which California has imposed.

In sum, the combination of Congressional authorization and the absence of any economic protectionism should remove this case from any dormant Commerce Clause scrutiny.

III. BECAUSE THERE ARE MAJOR DIFFERENCES BETWEEN MARINE VESSEL AND TRUCK INSPECTIONS, THERE IS EITHER NO DISCRIMINATION OR A VALID JUSTIFICATION FOR DISCRIMINATION

Even if California's inspection fee is subject to dormant Commerce Clause scrutiny, that fee still should be upheld. The California Supreme Court's conclusion that charging fees for marine vessel but not truck inspections constitutes improper discrimination was based on the faulty premise that these two types of inspections are comparable. Logically, there can be no "discrimination" in the treatment of two transactions or events unless the events are substantially similar. Discrimination may lie either in the different treatment of similar things, or the same treatment of different things. See *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 717 (1972) (where there is an "*inherent difference* between . . . two classes of flights . . . the application of the *same fee* to both would amount

to *discrimination* against one or the other"). (Emphasis added).[10]

Here, there are major differences between marine vessel and truck inspections which justify different fee treatment. The most relevant difference is the cost, time, and complexity of the inspections. Commercial truck inspections at state border stations take between 5-30 minutes, enforce a smaller number of state-imposed quarantines, and cover a much larger number of conveyances (roughly 280,000 commercial trucks a year). In contrast, inspections of a vessel and its cargo take much more time, enforce a greater number of federal quarantines, and involve far fewer inspections. Because truck inspections are relatively simple, the State forgoes fees for this service but charges fees for more complicated AQI services such as fumigation.

Collecting individual fees from each of the 280,000 trucks that are inspected could impose administrative collection burdens that are not worth the expense. Collecting fees also could disrupt traffic flow at border stations which would inconvenience the thousands of passenger cars that pass through State border stations daily. Consequently, there are valid "non-protectionist" reasons why the State forgoes collection of fees from commercial trucks. In addition, state border inspections have been conducted for decades, long before the California Inspection Act program for foreign commerce was enacted. Consequently, collecting fees under one program

---

[10] That the California Supreme Court questioned whether a "substantially similar" requirement applied in Commerce Clause cases outside the tax context, see App. 28-29, illustrates the limitations of its Commerce Clause analysis.

but not the other can be explained by the different historical circumstances and budgetary philosophies which were current when the programs were established.

The major differences in time, cost, and scope of commercial truck and marine vessel inspections are indisputable. The California Supreme Court held, however, that while these differences might justify a *lower fee* for truck inspections, they could not justify charging *no fee* for truck inspections. The California Supreme Court used an excessively exacting standard in reaching this conclusion. This Court has rejected the argument that user fees on commercial activity must be exactly tailored to the cost of the state services to avoid invalidation under the Commerce Clause. See *Northwest Airlines, Inc. v. County of Kent, Michigan*, 114 S.Ct. 855, 859-866 (1994); *Evansville Airport, supra*, 405 U.S. at 714-717 (fees need only be based on "fair approximation of use"); *Pure Oil Co. v. State of Minnesota*, 248 U.S. 158, 162-163 (1918). When there is no economic protectionism, all that is required under the dormant Commerce Clause is a reasonable relationship between the fee and the cost of state services, see *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 597-600 (1939), or valid non-protectionist reasons for fee distinctions. See *McLean v. Denver & Rio Grande Railroad Co.*, 203 U.S. 38, 53-54 (1906) (inspection fee on hides shipped out of State but not on hides within State upheld based on legitimate law-enforcement reasons for the distinction).

Given the lesser costs of truck inspections, the administrative and traffic consequences of collecting trucking fees at border stations, and the different historical circumstances of the two inspection programs, the

State could properly collect fees for marine vessel inspections without having to charge fees in its longstanding border inspection program.

IV. THIS COURT'S WASTE DISPOSAL PRECEDENTS ARE DISTINGUISHABLE AND INAPPLICABLE

The California Supreme Court erroneously thought that *Oregon Waste Systems v. Dept. of Environmental Quality, supra,* 114 S.Ct. 1345, and *Chemical Waste Management, Inc. v. Hunt, supra,* 504 U.S. 334, compelled the conclusion that California's inspection fees violated the dormant Commerce Clause. Those cases, however, are distinguishable. First, both *Oregon Waste* and *Chemical Waste* were classic examples of economic protectionism. In both cases, the States were trying to benefit in-state interests at the expense of out-of-state ones by charging higher fees for the disposal of out-of-state waste than for in-state waste. Here, there is no comparable economic protectionism at work.

Second, in *Chemical Waste* and *Oregon Waste,* the States were discriminating by charging different disposal fees for *identical* waste. See *Oregon Waste, supra,* 114 S.Ct. at 1348 (noting that in *Chemical Waste,* higher fees were imposed on the disposal of out-of-state waste "than on the disposal of *identical* waste from Alabama.") (emphasis added); *Chemical Waste, supra,* 504 U.S. at 348 ("the record establishes that the hazardous waste at issue in this case *is the same* regardless of its point of origin") (emphasis added). There also was no evidence that the out-of-state waste in those cases was more costly to dispose of or more hazardous than in-state waste. See *Chemical Waste, supra,* 504 U.S. at 343-344 (noting the trial court's finding that "there is absolutely no evidence before this Court

that waste generated outside Alabama is more dangerous than waste generated in Alabama."); *Oregon Waste, supra,* 114 S.Ct. at 1351 ("No claim has been made that the disposal of waste from other States imposes higher costs on Oregon . . . than the disposal of in-state waste."). Here, in contrast, the inspections for vessels and trucks are significantly different in terms of cost, time, and scope. Consequently, the justification for different fees which was entirely absent in *Chemical Waste* and *Oregon Waste* is undisputed in this case. Further, the very essence of the foreign pest inspections is to intercept pests not known to exist in the United States, including California. *A fortiori,* these foreign commodities present threats different from and more dangerous than domestic interstate pests. App. 93-94, ¶2.

Finally, congressional authorization or federal approval of the challenged state regulation was not an issue in the waste cases. See *Chemical Waste, supra,* 504 U.S. at 346 n.9 (noting that the issue of congressional authorization was pretermitted because it was not relied on below nor was it briefed or argued by the parties). In contrast, the challenged fees here are not only consistent with the federal regulatory regime but were used partly to finance such federal regulation.[11]

---

[11] The statement in *Oregon Waste Systems, supra,* 114 S.Ct. at 1351 n.5, that different state costs of disposing of in-state and out-of-state waste might justify "a differential charge" does not mean, as the California Supreme Court thought, that California can *only* adopt "differential" fees for vessels and trucks but cannot forego fees altogether for trucks. See App. 35. The "differential charge" discussion in *Oregon Waste Systems* arose in a case where there were no other non-protectionist

CONCLUSION

One out of every five jobs in California is related to the State's $19 billion a year agricultural industry, App. 8; CT 2128; hence the State's interest in wanting to augment USDA's foreign pest control effort. The State's inspection fee does not conflict with Congress' "dormant" powers under the Commerce Clause. Instead, it augments the very pest regulation of foreign commerce that Congress has mandated. The anti-discrimination principle in the Commerce Clause has been distorted in this case to further the economic interests of a particular group of shippers rather than serve any of the rationales or purposes of the Commerce Clause.

The petition for a writ of certiorari should be granted.

March 1996

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California
RODERICK E. WALSTON
Chief Assistant Attorney General
CHARLES W. GETZ IV
(Counsel of Record)
Assistant Attorney General
LINUS MASOUREDIS
Deputy Attorney General

---

reasons for not imposing fees. Because there are valid non-protectionist reasons for not imposing fees on trucks in this case, the "differential charge" discussion in *Oregon Waste Systems* is inapplicable.

No. _____

In The

Supreme Court of the United States

October Term, 1995

ANN M. VENEMAN, Secretary, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; ISLAM SIDDIQUI, Assistant Director, CALIFORNIA DIVISION OF PLANT INDUSTRY; STATE OF CALIFORNIA,

Petitioners,

v.

PACIFIC MERCHANT SHIPPING ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

[No. S044869. Dec. 29, 1995.]

California Supreme Court

PACIFIC MERCHANT SHIPPING ASSN., Plaintiff and Respondent, v.
Henry VOSS, as Director, etc., et al., Defendants and Appellants.

COUNSEL

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Walter Wunderlich, Assistant Attorney General, Charles W. Getz IV and Marc N. Melnick, Deputy Attorneys General, for Defendants and Appellants.

Lillick & Charles, Sher & Blackwell, R. Frederic Fisher, Lawrence N. Minch, David F. Smith, Jeffrey F. Lawrence, Cindy Buys, Minder & Muro and Thomas G. Minder for Plaintiff and Respondent.

OPINION

MOSK, J. – In this appeal we consider whether two statutes and a regulation authorizing the California Department of Food and Agriculture to levy an inspection fee on ships carrying agricultural goods into California from foreign countries (Food & Agr. Code, §§ 5352 & 5353, subd. (b); Cal. Code Regs., tit. 3, § 3560, subd. (b)), when no such fee is levied on carriers bringing such goods into California from other states, unjustifiably discriminate on their face against foreign commerce in violation of the negative aspect of the foreign commerce clause of the United States Constitution. (U.S. Const., art. I, § 8, cl. 3.)

We shall conclude, as the trial court ruled, that the cited provisions are facially discriminatory and that the discrimination cannot be justified under the controlling "strictest scrutiny" standard. We therefore reverse the judgment of the Court of Appeal holding the provisions to be nondiscriminatory.

Background

The United States Department of Agriculture (USDA) has long maintained a comprehensive program for inspecting potentially contaminated or otherwise harmful agricultural products brought into the United States from foreign countries. (See, e.g., 7 U.S.C. § 151 et seq. [Plant Quarantine Act of 1912]; 7 U.S.C. § 150ee ["The Secretary [of the USDA] may promulgate such regulations requiring inspections of products and articles of any character whatsoever and means of conveyance . . . as a condition of their movement into or through the United States, or interstate, and imposing other conditions upon such movement, as he deems necessary to prevent the dissemination into the United States, or interstate, of plant pests, . . . "]; 7 C.F.R. § 330.100 et seq. (1995).) The USDA currently enforces federal quarantines against virtually every country in the world, and these quarantines cover literally thousands of agricultural pests found only outside the United States. (See 7 C.F.R. § 319 (1995).) As part of this comprehensive program, all ships traveling from the specified foreign countries are subject to inspection by federal authorities at their first port of call in the United States. (*Id.*, § 330.105(a) (1995).) As payment for its services, the USDA currently levies a "user fee" of

$369.50 per inspection on all owners of nonexempt vessels. (7 C.F.R. §§ 330.107, 354.3(b) (1995).)

In 1990 our Legislature enacted the California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act (hereafter the Act) as part of a state-sponsored effort to supplement the USDA's agricultural pest control efforts in California. (Stats. 1990, ch. 1612, § 1, p. 7753.) The Legislature adopted the Act as an urgency statute effective September 30, 1990, because in its view "It is necessary to enact programs that are alternatives to the repeated application of pesticides in order to eradicate pests, including the Mediterranean fruit fly in Los Angeles County. This act would enact one such alternative and, in order to protect the people and the environment from the repeated application of pesticides and to protect California's agriculture from pests as soon as possible, it is necessary that this act take effect immediately." (Stats.1990, ch. 1612, § 8, p. 7755.)

The Act added sections 5350-5353 to the Food and Agricultural Code,[1] which direct the California Department of Food and Agriculture (the Department) to "establish a program for the inspection of conveyances entering California through airport and maritime facilities to prevent the introduction into, or the spread within, this state of pests." (§ 5350, subd. (a).) The Act specifically requires that the Department maintain plant quarantine inspection stations at California's airports and marine terminals (*id.*, subd. (b)) and establish a program for disseminating

---

[1] Unless otherwise indicated, all further statutory references are to this code.

information regarding the state's agricultural pest control and quarantine requirements at such points of entry (*id.*, subd. (c)). However, the Act does not expressly require the Department to establish and operate its own state-run inspection sites at airports and marine terminals, but instead broadly authorizes the Department to "contract with federal and state agencies . . . to assist [it] in carrying out the purposes of [the Act]." (§ 5353, subd. (g).)

On June 24, 1991, the Department entered into a reimbursable cooperative agreement (RCA) with the USDA. The RCA provided that the Department would pay the USDA to intensify its existing regulatory efforts by hiring additional federal agents to inspect ships and airplanes carrying agricultural goods into California from outside the United States. As a result of the RCA, the USDA was able to hire seven additional marine inspectors and forty-four additional airport inspectors. The RCA expressly provided, however, that it was to have no effect on the nature of the federal inspections; rather, it was intended only to make it possible for the USDA to increase its staff and perform more inspections. This arrangement with the USDA is the sole means by which the Department has implemented its duty to provide airport and marine inspections under section 5350, subdivision (a); the Department has never established a state-run commercial inspection program at airports or marine terminals. The original RCA expired on September 30, 1991, but was renewed through September 30, 1992, with minor revisions. There is no indication in the record whether the RCA was renewed thereafter.

For many years the Department has also inspected agricultural goods entering California by truck from

other states. (See §§ 5341 & 5341.5.)[2] Rather than contracting with a federal agency for this service, however, the Department itself maintains 16 state-run inspection sites on California's borders, staffed by some 126 state inspectors. Unless there are extraordinary circumstances, these inspectors enforce only California's agricultural quarantines; they do not regularly enforce federal quarantines or inspect commerce originating in foreign countries because the Department assumes that federal authorities inspected these goods when they first entered the United States and there is no reason to perform a second inspection.

The focus of this case is not on the legitimacy of California's overall agricultural inspection program or the propriety of the particular means that the Department has chosen to implement its regulatory obligations. Rather, we are here concerned with only one narrow issue: whether the mechanism that the Legislature has created to *fund* the Department's implementation of its statutory obligation under section 5350, subdivision (b), to provide for the inspection of ships carrying agricultural goods into California from foreign countries passes muster under the federal Constitution. We turn to that funding mechanism.

Section 5352 of the Act requires the Department to derive the funding needed to satisfy its obligations by "levy[ing] a fee on commercial marine carriers, based on

---

[2] The Department does not maintain truck inspection stations at the Mexican border. Instead, the USDA provides such inspections at federal inspection sites. (See 7 C.F.R. §§ 320.1-320.9 (1995).)

the schedule established pursuant to Section 5353, for the use of marine terminal facilities for plant and animal pest inspection, quarantine, and eradication."[3] Section 5352 also requires the Department to "identify and establish a list of countries which [it] has reason to believe are potential sources of exotic plant and animal pests." Section 5353, subdivision (b), then provides that "Each commercial marine carrier engaged in foreign commerce which carries animals or plants or other materials which are, or are likely to be, infected or infested with any pest shall pay a fee of two hundred dollars ($200) to the [Department] upon the initial arrival in this state of the carrier on a voyage which originated outside the United States from a country identified and listed by the [Department] . . . , or which made an intermediate stop on that voyage in a country identified and listed by the [Department]. . . . "[4]

---

[3] The Legislature has enacted a similar provision relating to airport inspections: "The [Department] shall levy a service charge . . . based on the schedule established pursuant to Section 5353, on each air carrier or foreign air carrier engaged in foreign air commerce . . . for the use of airport facilities for plant and animal pest inspection, quarantine, and eradication." (§ 5351, subd. (a).)

[4] Again the Legislature has enacted a virtually identical provision regarding airport inspections: "Each air carrier or foreign air carrier engaged in foreign air commerce which carries animals or plants or other materials which are, or are likely to be, infected or infested with any pest shall pay a charge of eighty-five dollars ($85) to the [Department] upon the initial landing in this state of each flight of the carrier which originates outside the United States." (§ 5353, subd. (a).) The Department initially adopted a regulation setting the fee at $85 effective April 1, 1991; it later reduced the fee to $43 effective January 1, 1995. (Cal. Code Regs., tit. 3, § 3560, subd. (a).)

The Act further authorizes the Department "by regulation, [to] increase or decrease any of the charges or fees prescribed in [section 5353, subdivision (b)] upon determining that the revenue received is inadequate or in excess of the amount needed to conduct an effective inspection program. The maximum adjusted charge or fee shall not exceed [$600]." (§ 5353, subd. (f).) The Department initially adopted a regulation setting the marine inspection fee at $200 effective April 1, 1991; it later amended the regulation by reducing the fee to $100 effective January 1, 1995. (Cal. Code Regs., tit. 3, § 3560, subd. (b).)

The Department gave the following explanation for the 1995 fee reduction in the informative digest section of the public notice of amendment: "Since this inspection program was established in 1991, the Department has contracted with the United States Department of Agriculture (USDA) to perform the authorized inspections. The Secretary [of the Department] has determined that an effective inspection program can now be conducted with revenues from the lower service charge and user fee rates because the USDA is starting to provide inspections of international carriers at an adequate level. The USDA is now committed to supporting federal inspectors who previously had been funded by state contract.

"The revenue generated by the lowered service charges and user fees will be used for a program which will focus on oversight and coordination with the USDA on inspections of international carriers, investigations of smuggling, and intensification of public awareness and education efforts. Significant increases in the number of international travelers, levels of foreign trade and

repeated exotic pest infestations in California have created a need for an improved inspection program to protect California's $19.9 billion agricultural industry."[5]

In the 1992-1993 fiscal year, the Department collected inspection fees under this program totaling approximately $4.3 million, levied at the higher, pre-1995 rate. Of this $4.3 million, approximately one-fifth was collected as foreign marine inspection fees and approximately four-fifths as foreign airplane inspection fees. However, the Department used only $2.4 million of this aggregate amount to satisfy its obligations to the USDA for both airport and marine inspections. Approximately $1.6 million of the remaining $1.9 million was allocated to administrative costs and educational activities.

The Department's own state-run program for inspecting agricultural goods entering California from other states – as opposed to agricultural goods entering California from foreign countries – is funded very differently. Carriers of such domestic goods pay no fee at all for routine inspections.[6] The state currently pays for routine domestic inspections from the general fund, and has done so for many years. As of 1992, the state-run inspection program for out-of-state domestic agricultural goods cost

---

[5] Plaintiff's request that we take judicial notice of the Department's public Notice of Amendment of California Code of Regulations, title 3, section 3560, subdivision (b), is granted. (Evid. Code, §§ 452, subd. (b), 459, subd. (a).)

[6] They are charged only for special services such as fumigation, destruction of contaminated goods, or special delivery arrangements.

California taxpayers an average of approximately $8.4 million each year.

In December 1991 plaintiff Pacific Merchant Shipping Association (hereafter Pacific Merchant), an unincorporated association of marine carriers, brought this action on behalf of a class of carriers that had paid the foreign marine inspection fee. Pacific Merchant's operative pleading names Henry Voss, the director of the Department, and Islam Siddiqui, the assistant director of the Department and the head of its Plant Pest and Quarantine Division, as defendants in their official capacities,[7] and alleged that the Department's overall mechanism for funding its agricultural inspection program is unconstitutional inter alia because it imposes a discriminatory and unreasonable burden on carriers in foreign commerce that is not imposed on carriers in domestic interstate commerce, in violation of the federal commerce clause.[8]

The trial court granted summary judgment in favor of Pacific Merchant on the ground that the marine inspection fee unjustifiably discriminates on its face against foreign commerce in violation of the commerce clause of the United States Constitution. The court reasoned that

---

[7] For ease of reference, defendants Voss and Siddiqui will hereafter be referred to collectively as the Department.

[8] Throughout this opinion, the terms "foreign commerce" and "foreign marine commerce" will be used to refer to agricultural goods brought into California from outside the United States. The term "domestic interstate commerce" will refer to agricultural goods brought into California from other states. The term "intrastate commerce" will denote agricultural goods transported exclusively within California.

"The evidence submitted by the [Department] in its supplemental papers is sufficient to support the imposition of a higher fee on foreign ship inspections as opposed to interstate trucking. However, the [Department] has presented no evidence which explains why no fee is collected on interstate inspections. The facts are undisputed that overall the state incurs greater costs in performing the interstate inspections. Therefore it is the burden of the state to justify its fee system. The statute is facially discriminatory against foreign commerce and as such must be examined with the strictest scrutiny. The [Department's] justification does not pass that test." The court entered a judgment that declared the challenged provisions unconstitutional, enjoined the Department from collecting foreign marine inspection fees, and ordered a refund. The Department appealed.

The Court of Appeal reversed the judgment on the ground that there was a triable issue of fact as to whether the particular types of foreign commerce and domestic interstate commerce involved in this case are sufficiently "similarly situated" that they can be compared for the purpose of determining whether the challenged funding mechanism is discriminatory.[9]

---

[9] The Court of Appeal also concluded there were triable issues of fact regarding Pacific Merchant's other contentions, namely, that the foreign marine inspection fee violates the tonnage duty clause (U.S. Const., art. I, § 10, cl. 3) and export-import clause (*id.*, art. I, § 10, cl. 2) of the federal Constitution, that it conflicts with the General Agreement on Tariffs and Trade, and that it is preempted by federal law. These claims were not properly before the Court of Appeal because the trial court expressly declined to address them in the first instance and limited its judgment to the commerce clause claim.

We granted review limited to the issue whether the foreign marine inspection fee in question violates the commerce clause of the United States Constitution.

1. *The Negative Commerce Clause*

The commerce clause of the federal Constitution empowers Congress to enact laws "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." (U.S. Const., art. I, § 8, cl. 3.) The actual language of the clause, however, places no express limits on the authority of the states to regulate such commerce. This rather striking omission has been characterized as one of the "great silences of the Constitution." (*Hood & Sons v. Du Mond* (1949) 336 U.S. 525, 535 [93 L.Ed. 865, 872, 69 S.Ct. 657].) Nevertheless, the United States Supreme Court has repeatedly held for over a century that the commerce clause also limits the states' power to regulate both domestic interstate and foreign commerce, whether or not Congress has acted. (See, e.g., *Barclays Bank v. Franchise Tax Bd. of California* (1994) 512 U.S. ___ [129 L.Ed.2d 244, 257, 114 S.Ct. 2268, 2276] (*Barclays Bank*) [the commerce clause "has long been understood . . . to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted. . . . ' "]; *Oregon Waste Systems v. Dept. of Env. Quality* (1994) 511 U.S. ___ [128 L.Ed. 2d 13, 20, 114 S.Ct. 1345, 1349] (*Oregon Waste*) ["Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."];

accord, *Associated Industries of Missouri v. Lohman* (1994) 511 U.S. ___, ___ [128 L.Ed.2d 639, 645-646, 114 S.Ct. 1815, 1820]; *Wyoming v. Oklahoma* (1992) 502 U.S. 437, 454 [117 L.Ed.2d 1, 22-23, 112 S.Ct. 789]; *Lewis v. BT Investment Managers, Inc.* (1980) 447 U.S. 27, 35 [64 L.Ed.2d 702, 711, 100 S.Ct. 2009]; *Welton v. State of Missouri* (1876) 91 U.S. (1 Otto.) 275 [23 L.Ed. 347].) Thus, any state statute or regulation that impacts domestic interstate or foreign commerce is subject to judicial scrutiny under the commerce clause unless the statute or regulation has been preempted, or expressly authorized, by an act of Congress. (See, e.g., *Atlantic Coast Demo. v. Bd. of Chosen Freeholders* (3d Cir. 1995) 48 F.3d 701, 710.) The commerce clause's implicit, self-executing restriction on the states' power to regulate domestic interstate and foreign commerce is commonly referred to as the "negative" or "dormant" commerce clause. (*Barclays Bank, supra*, 512 U.S. ___, ___, fn. 9 [129 L.Ed.2d 244, 257, 114 S.Ct. 2268, 2276].)

Although the negative commerce clause was derived essentially by implication from the clause's express "positive" grant of legislative authority to Congress, it is by no means simply an incidental emanation or penumbra of that clause. To the contrary, "The 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison. In one of his letters, Madison wrote that the Commerce Clause 'grew out of the abuse of the power by the importing States in taxing the nonimporting, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.' 3 M. Farrand, Records of the Federal Convention

of 1787, p. 478 (1911)." (*West Lynn Creamery, Inc. v. Healy* (1994) 512 U.S. ___, ___ fn. 9 [129 L.Ed.2d 157, 166, 114 S.Ct. 2205, 2211]; see also *Hughes v. Oklahoma* (1979) 441 U.S. 322, 325-326 [60 L.Ed.2d 250, 255, 99 S.Ct. 1727] [commerce clause reflected the concern of the framers "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"]; *Baldwin v. G.A.F. Seelig* (1935) 294 U.S. 511, 522 [79 L.Ed. 1032, 1038, 55 S.Ct. 497, 101 A.L.R. 55] ["a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation' "]; see generally, The Federalist Nos. 41, 42 [Madison]; 2 Bailyn, The Debates on the Federal Constitution (1993) p. 662 [Madison's speech at the Virginia Ratifying Convention, June 11, 1788]; 3 Farrand, Records of the Federal Convention of 1787 (rev. ed. 1966) p. 547 [Madison's Preface to Debates in the Convention of 1787, stating inter alia that under the Articles of Confederation the "want of a general power over Commerce led to an exercise of this power separately, by the States, [which] not only proved abortive, but engendered rival, conflicting and angry regulations."].)

James Madison was not alone in his views. Another important contemporary figure, Alexander Hamilton, wrote that the federal government should be authorized to regulate domestic interstate and foreign commerce and that the states' legislative power on this topic should be limited, lest "The interfering and unneighbourly regulations of some States contrary to the true spirit of the Union . . . be multiplied and extended till they became not less serious sources of animosity and discord, than

injurious impediments to the intercourse between the different parts of the confederacy." (The Federalist No. 22 (Cooke ed. 1961) p. 137.) According to Hamilton, the absence of such uniform national control might gradually lead to what we would now call the balkanization of the several states, undermine Congress's ability to enter into agreements with foreign nations on behalf of the United States as a whole, restrict foreign commerce to the point that our national resources would lie fallow, and eventually cause citizens of each state to treat the citizens of other states like foreigners rather than fellow citizens of the United States. (*Id.* at pp. 135-137; see also The Federalist No. 11 [Hamilton].) Indeed, there is evidence to suggest that Hamilton's prophecy could well have come true had the states not consented to give up the power to regulate commerce by ratifying the Constitution. (See *Brown v. Maryland* (1827) 25 U.S. (12 Wheat.) 419, 445-446 [6 L.Ed. 678, 688] ["The oppressed and degraded state of commerce, previous to the adoption of the constitution, can scarcely be forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions, were rendered impotent, by want of combination."]; *Gibbons v. Ogden* (1824) 22 U.S. (9 Wheat.) 1, 226 [6 L.Ed. 23, 77] (conc. opn. of Johnson, J.) [Prior to the adoption of the Constitution "There was not a state in the Union, in which there did not . . . exist a variety of commercial regulations; . . . "].)

Thus, despite the fact that there is no express textual basis in the commerce clause to justify a limitation on the states' authority to regulate domestic interstate and foreign commerce, there can be no doubt whatever that such

a limitation was intended by the framers and that the matter was of paramount concern to many or all of the delegates to the Constitutional Convention of 1787. Indeed, Chief Justice John Marshall later wrote that "It may be doubted, whether any of the evils proceeding from the feebleness of the federal government [under the Articles of Confederation], contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by congress." (*Brown v. Maryland, supra,* 25 U.S. (12 Wheat.) 419, 446 [6 L.Ed. 678, 688].)

2. *The Issue of Facial Discrimination*

Having placed the matter in perspective, we focus on the narrow issue before us: whether the inspection fee levied on vessels in foreign commerce by authority of the challenged provisions (§§ 5352 & 5353, subd. (b); Cal. Code Regs., tit. 3, § 3560, subd. (b)) violates the negative commerce clause of the United States Constitution.

"[T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate [or foreign] commerce, or discriminates against interstate [or foreign] commerce.' . . . If a restriction on commerce is discriminatory, it is virtually *per se* invalid. [Citations.] By contrast, nondiscriminatory regulations that have only incidental effects on interstate [or foreign] commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' " (*Oregon Waste, supra,* 511 U.S. ___, ___, [128 L.Ed.2d 13, 21, 114

S.Ct. 1345, 1350].) The party challenging the statute's validity bears the burden of showing discrimination. (*Hughes v. Oklahoma, supra,* 441 U.S. 322, 336 [60 L.Ed.2d 250, 261-262].)

In this context " 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." (*Oregon Waste, supra,* 511 U.S. ___, ___ [128 L.Ed.2d 13, 21, 114 S.Ct. 1345, 1350].) Such discrimination may take any of three forms: first, the state statute may facially discriminate against interstate or foreign commerce; second, it may be facially neutral but have a discriminatory purpose; third, it may be facially neutral but have a discriminatory effect. (*Chemical Waste Management, Inc. v. Hunt* (1992) 504 U.S. 334, 344, fn. 6 [119 L.Ed.2d 121, 133, 112 S.Ct. 2009] (*Chemical Waste*) [statute may be discriminatory either in purpose or effect]; *Hughes v. Oklahoma, supra,* 441 U.S. 322, 336 [60 L.Ed.2d 250, 261] [state statute may discriminate "either on its face or in practical effect"]; *SDDS, Inc. v. State of S.D.* (8th Cir. 1995) 47 F.3d 263, 267 [listing the three types of discrimination and citing cases illustrating each].)

In determining whether a state statute is *facially* discriminatory, the following matters are irrelevant: the justification that the state offers for the discrimination, the legitimacy of the state interests that the statute is designed to protect, the degree and scope of the discrimination, and the volume of commerce affected. (*Oregon Waste, supra,* 511 U.S. ___, ___ [128 L.Ed.2d 13, 22, 114 S.Ct. 1345, 1350] ["the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory"]; *Kraft General Foods, Inc. v. Iowa Dept. of Revenue and*

Finance (1992) 505 U.S. 71, 81 [120 L.Ed.2d 59, 69, 112 S.Ct. 2365] (*Kraft General Foods*) ["a State may not advance its legitimate goals by means that facially discriminate against foreign commerce"]; *Chemical Waste, supra,* 504 U.S. 334, 341-342 [119 L.Ed.2d 121, 131-132] [listing high court decisions invalidating state statutes attempting to further a " 'presumably legitimate goal' " through illegitimate discriminatory means]; *Wyoming v. Oklahoma, supra,* 502 U.S. 437, 455 [117 L.Ed.2d 1, 23] ["The volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated. . . . "]; *SDDS, Inc. v. State of S.D., supra,* 47 F.3d 263, 271, fn. 12 [degree and scope of discrimination irrelevant].)

Pacific Merchant contends that the statutes and regulation here at issue facially discriminate against foreign commerce because they impose inspection fees only on vessels "engaged in foreign commerce . . . on a voyage which originated outside the United States from a country identified and listed by the [Department] . . . , or which made an intermediate stop on that voyage in a country identified and listed by the [Department]" (§ 5353, subd. (b)), while no state statute or regulation authorizes the Department to levy such an inspection fee on carriers of domestic interstate commerce, whether transported by truck, ship, or any other means; instead, the Legislature has allowed the Department to provide routine inspections to such domestic carriers free of charge at California taxpayer expense.

We recognize that this case is somewhat atypical in that Pacific Merchant contends the cited provisions are discriminatory because they favor domestic interstate

commerce over foreign commerce, but does not contend the provisions also favor California intrastate commerce. It is perhaps more common for a party challenging a state statute on commerce clause grounds to contend the statute constitutes local protectionism because it discriminates against out-of-state commercial interests in favor of in-state interests. (See, e.g., *Baldwin v. G.A.F. Seelig, supra,* 294 U.S. 511, 527 [79 L.Ed. 1032, 1040] [key principle underlying negative commerce clause is that "one state in its dealings with another may not place itself in a position of economic isolation"].) But this is a distinction without a difference: as the United States Supreme Court recently held, "a State's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination. As the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions." (*Kraft General Foods, supra,* 505 U.S. 71, 79 [120 L.Ed.2d 59, 68].) Nor does this distinction render distinguishable the many high court precedents addressing commerce clause challenges to state statutes that assertedly discriminate between intrastate and domestic interstate commerce. As the parties rightly concede, the fundamental issue is the same both when the challenging party asserts that a state statute discriminates between intrastate and domestic interstate commerce and when the party asserts that the statute discriminates between domestic interstate commerce and foreign commerce: in each case the issue is whether the statute treats the federally protected class of commerce less favorably than other classes of commerce.

(Compare, for example, *Oregon Waste, supra*, 511 U.S. ___, ___ [128 L.Ed.2d 13, 21-22, 114 S.Ct. 1345, 1350] [discrimination between intrastate and interstate commerce], and *Kraft General Foods, supra*, 505 U.S. 71, 75 [120 L.Ed.2d 59, 65-66] [discrimination between domestic and foreign commerce].)

Turning therefore to the merits of this appeal, we believe that the high court's reasoning in two recent cases – *Oregon Waste, supra*, 511 U.S. ___ [128 L.Ed.2d 13, 114 S.Ct. 1345], and *Chemical Waste, supra*, 504 U.S. 334 – requires us to conclude that the provisions in issue here facially discriminate against foreign commerce. In *Chemical Waste* the high court reviewed the constitutionality of an Alabama statute imposing a base fee of $26.50 per ton on all hazardous waste disposed of at commercial facilities in Alabama and an "additional fee" of $72.00 per ton if the hazardous waste was generated out of state. In upholding the statute the Alabama Supreme Court identified several purposes that it served, including protection of the health and safety of the local citizenry, environmental conservation, and compensation for the costs and burdens that out-of-state waste generators impose on Alabama by dumping their hazardous waste in that state. The United States Supreme Court acknowledged that "These may all be legitimate local interests" (504 U.S. at p. 343 [119 L.Ed.2d at p. 133]), but held them irrelevant to the question whether the statute facially discriminated against interstate commerce: " ' "[T]he evil of protectionism can reside in legislative means as well as legislative ends. . . . [W]hatever [the state's] ultimate purpose, it may not be [accomplished] by discriminating against articles of commerce coming from outside the State unless

there is some reason, apart from their origin, to treat them differently." ' " (*Id.* at pp. 340-341 [119 L.Ed.2d at p. 131].)[10] The high court stressed (504 U.S. at pp. 340-341 [119 L.Ed.2d at p. 131].) that it had " ' "consistently found parochial legislation of this kind to be constitutionally invalid," ' " citing a number of cases in which " 'a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy.' " (*Id.* at pp. 341-342 [119 L.Ed.2d at pp. 131-132].) The court concluded that the Alabama statute was facially discriminatory because it imposed a higher fee on waste coming from outside the state than on waste generated in state, reasoning that " '[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.' [Citations.]" (*Id.* at p. 342. [119 L.Ed.2d at p. 132].)

Two years later, in *Oregon Waste, supra,* 511 U.S. ___ [128 L.Ed.2d 13, 114 S.Ct. 1345], the high court considered a constitutional attack on Oregon statutes imposing a total fee of disposal of $3.10 per ton on disposal of waste originating out of state but only $0.85 per ton on disposal of waste originating in state. The court reasoned that "In *Chemical Waste,* we easily found Alabama's surcharge on hazardous waste from other States to be facially discriminatory because it imposed a higher fee on the disposal of out-of-state waste than on the disposal of identical in-state waste. 504 U.S. at ___, [119 L.Ed.2d at 131-133], 112 S.Ct. at 2013-2014. We deem it equally obvious here that

---

[10] The qualifying clause refers to the state's burden to *justify* any discrimination found to be present, a separate step that we discuss below. (Pt. 3, *post.*)

Oregon's $2.25 per ton surcharge is discriminatory on its face. The surcharge subjects waste from other States to a fee almost three times greater than the $0.85 per ton charge imposed on solid in-state waste. The statutory determinant for which fee applies to any particular shipment of solid waste to an Oregon landfill is whether or not the waste was 'generated out-of-state.' [Citation.] It is well-established, however, that a law is discriminatory if it ' "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." ' *Chemical Waste, supra,* at ___, [119 L.Ed.2d at 132-133] 112 S.Ct. at 2014 [citations].

"Respondents argue, and the Oregon Supreme Court held, that the statutory nexus between the surcharge and 'the [otherwise uncompensated] costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state,' [citation] necessarily precludes a finding that the surcharge is discriminatory. We find respondents' narrow focus on Oregon's compensatory aim to be foreclosed by our precedents. As we reiterated in *Chemical Waste,* the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory. See 504 U.S. at ___, [119 L.Ed.2d at 131-132], 112 S.Ct. at 2013. [Citation.] Consequently, even if the surcharge merely recoups the costs of disposing of out-of-state waste in Oregon, the fact remains that the differential charge favors shippers of Oregon waste over their counterparts handling waste generated in other States. In making that geographic distinction, the surcharge patently discriminates against interstate commerce." (511 U.S. at p. ___ [128 L.Ed.2d at pp. 21-22, [114 S.Ct. at p. 1350], fn. omitted.)

The high court's reasoning on the issue of facial discrimination is equally applicable to the statutes and regulation before us. Here, as in *Oregon Waste* and *Chemical Waste*, the challenged provisions expressly burden a federally protected class of commerce – in this case foreign commerce – by exacting a fee for all routine inspections, while leaving all other classes of commerce – most notably domestic interstate commerce – entirely unburdened by such a fee. The sole "statutory determinant" for whether the fee applies to any particular shipment into California is whether it is carried in a vessel "engaged in foreign commerce . . . on a voyage which originated outside the United States from a country identified and listed by the [Department] . . . , or which made an intermediate stop on that voyage in a country identified and listed by the [Department]" (§ 5353, subd. (b)). The determinant is thus exclusively a matter of geography, and "In making that geographic distinction, the [inspection fee] patently discriminates against [foreign] commerce." (*Oregon Waste, supra*, 511 U.S. ___, ___, [128 L.Ed.2d 13, 22, 114 S.Ct. 1345, 1350].)

Indeed, the discrimination is even more patent in the matter before us than in *Chemical Waste* or *Oregon Waste*. In both of those cases the in-state beneficiaries of the statutory scheme paid at least *some* fee; here, carriers in domestic interstate commerce pay no fee whatever. The consequence is dramatic. In *Oregon Waste*, out-of-state waste was subjected to a total fee 3.6 times greater than in-state waste ($3.10 ÷ $0.85); similarly, in Chemical Waste the disparity was 3.7 ($98.50 ÷ 26.50). By contrast, if for example the domestic interstate commerce in the case at bar had been charged an inspection fee of even one dollar

per shipment, foreign commerce would have been subjected to a fee one hundred times greater ($100 ÷ $1). But the reality is still worse: the charge against domestic interstate commerce is zero. Because the disparity between any number and zero is infinite, foreign commerce is thus subjected to a fee *infinitely* greater than domestic interstate commerce.

The decision of the Court of Appeal to the contrary is predicated on an erroneous line of reasoning. The Court of Appeal in effect acknowledged the force of the United States Supreme Court decisions discussed above: "Pacific Merchant purports to lump all inspections performed by the Department into what it views as a single pest-prevention program, a view which allows it to posit facial discrimination in the statute at issue because it imposes fees only on certain inspections. Were we to accept this characterization, Pacific Merchant would need to do little other than point to the waste disposal fee cases cited above (or cases in which taxes are imposed on one type of commerce and not another) and demand that the Department produce evidence demonstrating a compelling reason for charging fees for one and not the other. This would be a Sisyphean task for the Department, because fees imposed in discriminatory manner by a single program (or discriminatory fees and taxes unrelated to a substantive regulatory program) are inevitably stricken down." (Fn. omitted.)

The Court of Appeal declined to so hold, however, because it believed that "Unlike the waste-disposal cases in which the high court was presented with a single regulatory program charging disparate fees (or cases where there are no regulatory programs at all), we here

have an inspection program for ships (and planes) *administratively and financially segregated* from either the general fund or even the remainder of the Department's budget; in point of fact, the inspections themselves are even performed almost entirely by a different sovereign [USDA] subsidized by California." (Italics added.)

This effort to distinguish *Oregon Waste* and *Chemical Waste* is unavailing. The "financial segregation" stressed by the Court of Appeal is the very disparity in the Department's funding scheme – i.e., foreign commerce is charged an inspection fee but domestic interstate commerce inspections are paid for out of the general fund – that renders the scheme facially discriminatory under *Oregon Waste* and *Chemical Waste*. And the fact that the Department has contracted out the administration of the foreign commerce inspection program to the USDA is without significance: the discrimination is not in who administers the program, but in who pays for it. The funding scheme would be no less discriminatory if the Department were to abrogate its arrangement with the USDA and undertake to inspect foreign commerce itself.[11]

---

[11] Although the Court of Appeal did not identify other differences in the way the Department administers foreign commerce and domestic interstate commerce inspection programs, any such differences would be equally immaterial: the federal constitutional validity of the funding scheme cannot be made to depend on the Department's administrative convenience. (See, e.g., *Kraft General Foods, supra*, 505 U.S. 71, 81 [120 L.Ed.2d 59, 69].)

From this premise, nevertheless, the Court of Appeal concluded that "Since we have discrete regulatory programs under consideration, only one of which assesses the fees at issue, Pacific Merchant must thus initially demonstrate that the inspections of its ships are *sufficiently similar* to the other inspections taking place under the Department's other programs." (Italics added.) The court then held that Pacific Merchant did not prove such "similarity" as a matter of law, and hence was not entitled to summary judgment on the issue of discrimination.

The Court of Appeal cited no authority for its requirement that in order to show that the challenged fee structure is facially discriminatory Pacific Merchant must prove that the burdened class of foreign commerce and the unburdened class of domestic interstate commerce are "similarly situated." The Department now contends that requirement is supported by *Halliburton Oil Well Cementing Co. v. Reily* (1963) 373 U.S. 64 [10 L.Ed.2d 202, 83 S.Ct. 1201] (*Halliburton*), and its progeny. Thus in *Halliburton* the high court declared that "equal treatment for in-state and out-of-state taxpayers *similarly situated* is the condition precedent for a valid use *tax* on goods imported from out-of-state." (*Id.* at p. 70 [10 L.Ed.2d at p. 207], italics added.) More recently, in *Kraft General Foods, supra,* 505 U.S. 71, 80, footnote 23 [120 L.Ed.2d 59, 68], the high court reiterated that "In considering claims of discriminatory taxation under the Commerce Clause . . . it is necessary to compare the taxpayers who are 'most similarly situated,' " citing *Halliburton.*

It is unclear from the Supreme Court jurisprudence, however, whether the "similarly situated" requirement

applies outside the context in which it arose, i.e., challenges to state *taxes* – particularly "compensatory" taxes – that assertedly discriminate against federally protected commerce. *Halliburton* is such a case, involving a state's use tax calculated on a higher basis for out-of-state manufacturer-users than for in-state manufacturer-users. *Kraft General Foods* is also such a case, involving a state's business tax on corporate income that taxed dividends received from foreign subsidiaries but not dividends received from domestic subsidiaries. And the same is true of the other progeny of *Halliburton* cited by the Department.[12]

This pattern does not appear to be a coincidence. Our research shows that the United States Supreme Court has never even cited, much less relied on, *Halliburton, supra,* 373 U.S. 64, in any case that did not involve a challenge to a state *tax* on foreign or domestic interstate commerce. Indeed, the Department cites no precedent of any kind that applies the "similarly situated" requirement outside the tax context. In particular, none of the high court cases reviewing a commerce clause challenge to a state *regulatory* statute – whether involving discriminatory fees as in

---

[12] *Bacchus Imports, Ltd. v. Dias* (1984) 468 U.S. 263 [82 L.Ed.2d 200, 104 S.Ct. 3049], involved a state's excise tax on wholesale liquor sales that exempted the two locally made spirits. *Armco Inc. v. Hardesty* (1984) 467 U.S. 638 [81 L.Ed.2d 540, 104 S.Ct. 2620], dealt with a state's gross receipts tax on businesses selling tangible property at wholesale that exempted local manufacturers. And *National Meat Ass'n. v. Deukmejian* (9th Cir. 1984) 743 F.2d 656, affd. *per curiam* (1985) 469 U.S. 1100 [83 L.Ed.2d 766, 105 S.Ct. 768], involved a per-pound tax that California imposed only on out-of-state processed beef.

Oregon Waste and *Chemical Waste* or outright prohibitions on imports or exports as in *Wyoming v. Oklahoma, supra,* 502 U.S. 437, and *Hughes v. Oklahoma, supra,* 441 U.S. 322 – even mentioned, much less applied, the "substantially similar" requirement in their discussion of the issue of discrimination.

It seems most appropriate that the requirement be imposed, moreover, in determining the validity of a *compensatory* tax. As the high court recently reiterated, a use tax that applies only to goods purchased out of state "may be saved from constitutional infirmity if it is a valid 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce. . . . To ensure that the State is indeed merely imposing countervailing burdens on comparable transactions, we have required that the taxes on interstate and intrastate commerce be imposed on 'substantially equivalent event[s].' " (*Associated Industries of Missouri v. Lohman, supra,* 511 U.S. ___, ___, [128 L.Ed. 2d 639, 647, 114 S.Ct. 1815, 1821].)

The point is underscored by one of the two recent regulatory fee cases we find controlling here, *Oregon Waste.* It is true, as the Department quotes in its brief, that in *Oregon Waste* the high court said that "the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies]' for each other." (511 U.S. ___, ___ [128 L.Ed.2d 13, 24, 114 S.Ct. 1345, 1352].) What the Department overlooks, however, is that the quoted statement had nothing to do with the high court's determination whether the fee in question was *discriminatory;* its

discussion of that issue (part II of its opinion) ended several pages earlier. Instead, the quotation is from part III of its opinion, devoted to the wholly distinct issue of whether the fee, although discriminatory, was nevertheless *justified* on a legal basis. Oregon had sought to justify its higher fee on out-of-state waste primarily on the basis that it was a compensatory tax, and the high court simply listed the "substantially equivalent" requirement as one of the three elements of that doctrine. The court explained that the compensatory tax doctrine itself is "merely a specific way of *justifying* a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means. See *Chemical Waste, supra,* 504 U.S. at ___, n. 9, [119 L.Ed.2d at 134-135] 112 S.Ct. at 2016, n. 9 (referring to the compensatory tax doctrine as a 'justif[ication]' for a facially discriminatory tax). Under that doctrine, a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce does not offend the negative Commerce Clause." (511 U.S. at p. ___ [128 L.Ed.2d at p. 23, 114 S.Ct. at p. 1352], italics added.) Reviewing Oregon's contentions in that light, the court concluded that the fee could not be justified as a compensatory tax. (*Id.* at p. ___ [128 L.Ed.2d at pp. 23-25, 114 S.Ct. at pp. 1352-1353].) As will appear (pt. 3, *post*), in the case at bar the Department does not contend that its facially discriminatory inspection fee can be justified as a compensatory tax.

In the absence of further guidance from the high court, we are reluctant to extend the "substantially similar" requirement beyond the tax context where it is most

appropriate and to which the court has thus far limited it, or to depart from the high court's often reiterated test of commerce clause discrimination by reading the requirement into that test. Under this view of the federal precedents, the Department's contention is without merit.

In any event, even if we assume arguendo that the "substantially similar" requirement does apply to regulatory fee cases, when that requirement is properly understood it appears satisfied on the undisputed facts before us. Although the high court has not articulated a test for determining when events are "substantially similar" for commerce clause comparison, we may fairly infer from its tax decisions that the court deems such events are not "substantially similar" when they differ not just in degree but in kind. Thus in *Halliburton, supra,* 373 U.S. 64, 71 [10 L.Ed.2d 202, 207-208], the court held that an out-of-state manufacturer-user and an in-state retailer are not "similarly situated." In *Maryland v. Louisiana* (1981) 451 U.S. 725, 758-759 [68 L.Ed.2d 576, 602-603, 101 S.Ct. 2114], the court held that the "first use" inside a state of natural gas piped in from outside the state and the "severance" of natural gas produced from wells in the state are not " 'substantially equivalent events." In *Armco Inc. v. Hardesty, supra,* 467 U.S. 638, 642-643 [81 L.Ed.2d 540, 545], the court held that manufacturing and wholesaling – even, presumably, of the same products – are not " 'substantially equivalent events.' " (Accord, *Tyler Pipe Industries v. Dept. of Revenue* (1987) 483 U.S. 232, 242-244 [97 L.Ed.2d 199, 210-212, 107 S.Ct. 2810] [same].) In *Oregon Waste, supra,* 511 U.S. ___, ___ [128 L.Ed.2d 13, 24-25, 114 S.Ct. 1345, 1353], the court held that the earning of income subject to general taxation and the disposal of waste

subject to a special regulatory surcharge are not "substantially equivalent events."

In the case at bar we are called on to compare inspections of agricultural produce entering California (1) by ship from foreign countries, and (2) by truck from other states. The Department contends these inspections are substantially dissimilar in three respects, but none is persuasive.

First, the Department states "The inspections seek different pests," but fails to explain the relevance of the point. Even if the pest species are different, it does not follow that the *inspections* to find them are substantially dissimilar – or at least any more dissimilar than inspections to find two different domestic pests (e.g., a fungus and a fly). More important, even if the different nature of foreign pests also means they are more difficult to find, that difference would be simply a matter of degree. It is true that such a difference could result in higher inspection costs; as will appear, however, higher costs are not relevant to the issue of facial discrimination but to the issue of justification.

Second, the Department states "Foreign pests are much more dangerous than domestic pests," but again fails to explain the relevance of the point. While the added danger of foreign pests may mean it is more important to find them, it does not follow that it is more difficult to do so. And even if it did, the difference would again be simply a matter of degree and at most result in higher inspection costs irrelevant to the issue of discrimination. The Department notes that in *Chemical Waste, supra*, 504 U.S. 334, 343-344 [119 L.Ed.2d 121, 133-134], the

high court emphasized a finding to the effect that " 'there is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama.' " The reliance is misplaced: the high court quoted this finding in its discussion of the issue of justification, not the issue of discrimination. (See also *Oregon Waste, supra*, 511 U.S. ___, ___ [128 L.Ed.2d 13, 22-23, 114 S.Ct. 1345, 1351] [noting the absence of "any safety or health reason unique to nonhazardous waste from other States" in its discussion of justification]; *Maine v. Taylor* (1986) 477 U.S. 131, 140-152 [91 L.Ed.2d 110, 122-130, 106 S.Ct. 2440] [holding that facially discriminatory ban on importing out-of-state baitfish was *justified* by danger to state's native fisheries].)

Third, the Department states that "Truck inspections take significantly less time, effort and expenditure to complete." Here the relevance of the point is plain but insufficient. On its face such a difference in inspection costs is a matter of degree; and like the higher costs that could flow from the first two distinctions proposed by the Department, such a differential would bear on justification rather than on discrimination. For example, in *Oregon Waste* the high court observed that Oregon could have claimed as a ground of *justification* – although it did not – that "the disposal of waste from other States imposes higher costs on Oregon and its political subdivisions than the disposal of in-state waste." (511 U.S. ___, ___ [128 L.Ed.2d 13, 22, 114 S.Ct. 1345, 1351], fn. omitted.) In a footnote at this point the high court explained that "if out-of-state waste did impose higher costs on Oregon than in-state waste, Oregon could recover the increased cost through a differential charge on out-of-state

waste. . . . " (*Id.* at p. ___, fn. 5 [128 L.Ed.2d at p. 22, 114 S.Ct. at p. 1351].) Thus the court said only that higher costs could have justified the discrimination it had previously found on the face of the statutes; it pointedly did *not* say that higher costs would have meant there was no discrimination in the first place because the burdened events were not "substantially similar."

In the case at bar the Department's programs to inspect ships in foreign commerce and trucks in domestic interstate commerce are programs that may differ in detail or degree but do not differ in kind or purpose: both are inspections of agricultural produce in search of harmful pests as that produce arrives at California's borders, and both are designed to prevent such pests from entering this state and damaging its agricultural industry. They may therefore be seen as "substantially equivalent events" for commerce clause purposes, and we may compare them in determining whether the fee structure imposed on such inspections by the challenged statutes and regulation is discriminatory. After making that comparison we hold, under the controlling decisions of the United States Supreme Court discussed above, that the provisions facially discriminate against foreign commerce in violation of the negative aspect of the foreign clause of the United States Constitution.

3. *The Issue of Justification*

A state statute that discriminates against a federally protected class of commerce "is virtually *per se* invalid." (*Oregon Waste, supra,* 511 U.S. ___, ___ [128 L.Ed.2d 13, 21, 114 S.Ct. 1345, 1350].) Such a statute must be declared

unconstitutional unless the state can justify the discrimination by showing that it " 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' " (*Id.* at p. ___ [128 L.Ed. 2d at p. 22, 114 S.Ct. at p. 1351].) The high court has repeatedly emphasized just how exacting this burden is: "Our cases require that justifications for discriminatory restrictions on commerce pass the 'strictest scrutiny.' [Citation.] The State's burden of justification is so heavy that 'facial discrimination by itself may be a fatal defect.' [Citations.]" (*Ibid.*; accord, *Chemical Waste, supra,* 504 U.S. 334, 342 [119 L.Ed.2d 121, 132] [statutes discriminating against protected commerce are "typically struck down without further inquiry"]; *Associated Industries of Missouri v. Lohman, supra,* 511 U.S. ___, ___ [128 L.Ed.2d 639, 645-647, 114 S.Ct. 1815, 1820]; *Hughes v. Oklahoma, supra,* 441 U.S. 322, 337 [60 L.Ed.2d 250, 262-263]; *Philadelphia v. New Jersey* (1978) 437 U.S. 617, 624 [57 L.Ed.2d 475, 481-482, 98 S.Ct. 2531].)[13]

The Department contends that the challenged provisions advance a legitimate local purpose, to wit, that they support a program of inspecting foreign marine commerce in order to prevent harmful pests from entering

---

[13] Contrary to the Department's assertion, the "virtually *per se* rule of invalidity" does not "hold only rhetorical value." Indeed, one federal district court recently stated that *Maine v. Taylor, supra,* 477 U.S. 131, is "the *only* case to date that this Court has found where the Supreme Court upheld a facially discriminatory regulation under the negative Commerce Clause." (*Clajon Production Corp. v. Petera* (D.Wyo. 1994) 854 F.Supp. 843, 859, fn. 30, italics added.) Our own research leads us to the same remarkable conclusion.

California from other countries and damaging the state's agricultural industry. We do not doubt this is a legitimate local purpose.

This conclusion, however, is only the beginning of our inquiry. Pacific Merchant does not contend, nor has it ever contended, that California's overall agricultural inspection program unduly burdens foreign marine commerce, or any other class of commerce for that matter. Instead, Pacific Merchant contends only that the Legislature's decision to impose an inspection fee on foreign marine commerce but to provide free inspections for domestic interstate commerce at state taxpayer expense unconstitutionally discriminates against foreign commerce. It is solely the constitutionality of that fee structure that we consider here. As will appear, we shall conclude that the Department's proffered justifications for its discriminatory fee structure cannot withstand the exacting demands of "strictest scrutiny."

The weakness of the Department's position is foreshadowed by its preliminary contention that charging a fee for inspecting foreign commerce serves what it describes as "the 'pay-as-you-play' principle," i.e., that "those who are subject to a regulation should pay for it to be implemented." We agree with the well-established notion that every class of commerce is obliged to " 'pay its own way' " (*Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 281 [51 L.Ed.2d 326, 332, 97 S.Ct. 1076]), and that "It was not the purpose of the commerce clause to relieve those engaged in interstate [or foreign] commerce from their just share of the state tax [or regulatory] burden." (*Western Live Stock v. Bureau of Revenue* (1938) 303 U.S. 250, 254 [82 L.Ed. 823, 827, 58 S.Ct. 546, 115 A.L.R.

944].) However, the Department's funding mechanism itself violates this principle. Carriers in foreign commerce pay at least their fair share of the expense that the Department incurs for the inspection of that commerce: for example, during the 1992-1993 fiscal year carriers in foreign marine and air commerce paid an aggregate of $4.3 million in inspection fees, yet the Department used only $2.4 million of the amount to support those inspections. In stark contrast, carriers in domestic interstate commerce pay no such fees at all, even though Department incurs substantial costs to inspect them. In the words of the Department's own figure of speech, both foreign and domestic interstate commerce "play" but only foreign commerce "pays."

The Department next reiterates its point that inspections of foreign marine commerce seek different and more dangerous pests and are more time-consuming than inspections of domestic interstate commerce by truck. As we observed in discussing the same point earlier, these distinctions could well result in higher inspection costs for foreign commerce, and the United States Supreme Court has acknowledged that a state could justifiably "recover the increased cost through a differential charge" on the disfavored class of commerce. (*Oregon Waste, supra*, 511 U.S. ___, ___, fn. 5 [128 L.Ed. 13, 22, 114 S.Ct. 1345, 1351].) But the high court's reasoning presumes that the favored class of commerce will at least pay its own share of the costs, so that the disfavored class will be burdened only by the "differential," i.e., the amount by which the latter exceeds the former. Here the Department

does not claim that the cost of domestic interstate commerce inspections is zero: on the contrary, it is undisputed that the Department has established 16 state-run border checkpoints and hired some 126 state inspectors to staff them, at an annual cost in 1992 of approximately $8.4 million. It is also undisputed, however, that domestic interstate commerce pays no part of that cost – the entire burden is borne by California taxpayers through the general fund.

We are thus not faced with a legislative decision to charge a lower fee for less expensive domestic interstate inspections and a higher fee for more expensive foreign marine inspections. Rather, the Legislature has selected a particular class of commerce – domestic interstate commerce – and provided routine inspections of that commerce free of charge, despite the fact that each such inspection costs California taxpayers money, but has determined that carriers engaged in another class of commerce – foreign marine commerce – should themselves bear the full state expense of such inspections. In short, the Legislature has not merely fixed agricultural inspection fees according to the average cost of each particular type of inspection; it has decreed that one class of commerce should receive free inspections and another should not. In these circumstances the difference in costs between the two types of inspections cannot justify the discrimination against the disfavored class.

For the same reason, the discriminatory fee on foreign marine commerce cannot be justified as a compensatory tax. To prevail on a claim that a facially discriminatory fee is justified on that basis the state must first prove that the favored commerce is subject to a

specific, identifiable state tax burden to which the unfavored commerce is not subjected and for which the discriminatory fee is designed to compensate. (*Oregon Waste, supra*, 511 U.S. ___, ___ [128 L.Ed.2d 13, 23-24, 114 S.Ct. 1345, 1352].) Here the Department does not and cannot contend there is any California tax that carriers of agricultural goods in domestic interstate commerce pay but that carriers of such goods in foreign commerce do not pay and for which the inspection fee on foreign commerce is designed to compensate.

Finally, the Department contends that two potential alternatives to its discriminatory fee structure would not be adequate to serve its purpose – or at least that there is a triable issue of fact as to whether such alternatives would be adequate or not. The proposed alternatives are (1) to remove the inspection fee on foreign commerce, or (2) to impose such a fee on domestic interstate commerce. The Department's contention is not persuasive.

With respect to the first alternative, the Department asserts only – quoting from a 1992 affidavit by one of its officials – that without the fees it collects from carriers in foreign commerce the state "has no funding available" to pay for such inspections. Viewed under the exacting standard of "strictest scrutiny," this evidence does not raise a triable issue of fact as to whether the Department's foreign marine inspection program could not be funded without the revenues generated by such fees. It is as true today as in 1992 that the State of California faces challenging economic times. But it would be unreasonable to conclude that if the Legislature could not levy foreign marine inspection fees it would decline to fund the program in another, constitutionally legitimate way.

The Legislature manifestly views the threat posed by nonnative agricultural pests as serious: as we have seen, in response to this threat the Legislature has for many years funded the Department's multimillion-dollar interstate border inspection program out of the general fund. In addition, as noted at the outset, the Legislature adopted the Act now before us as urgency legislation because it believed that "It is necessary to enact programs that are alternatives to the repeated application of pesticides in order to eradicate pests," and that the Act would produce "one such alternative" to help in its effort to "protect the people and the environment from the repeated application of pesticides" and "protect California's agriculture from pests." (Stats.1990, ch. 1612, § 8, p. 7755.) If, as the Department urges, the Act has indeed furthered these legislative goals, it is reasonable to conclude the Legislature will devise an alternate, constitutionally permissible funding mechanism to support the continued inspection of foreign marine commerce.[14]

---

[14] The fact that the Department has recently reduced its marine terminal and airport inspection fees by half further undermines its position. As noted above, the Department explained in its public notice of amendment that "The Secretary [of the Department] has determined that an effective inspection program can now be conducted with revenues from the lower charge and user fee rates because the USDA is starting to provide inspections of international carriers at an adequate level. The USDA is now committed to supporting federal inspectors who previously had been funded by state contract." The Department's own explanation suggests that the USDA, in apparent recognition of the concerns of the Department and others regarding the adequacy of its existing foreign inspection program, has obtained additional funding to increase the number of federal inspectors it employs and has used this

The Department advances four arguments against the alternative of imposing an inspection fee on domestic interstate commerce entering California by truck, but none is meritorious. First, the Department asserts that it would be difficult to calculate the proper amount of such a fee. It fails to explain, however, why the Legislature and the Department would have any more difficulty in setting the amount of an inspection fee on domestic interstate commerce than they had in setting the amount of the fee on foreign marine commerce now before us. Second, the Department contends that to collect such a fee for each truck would complicate the operation of its border inspection stations and might slow the flow of traffic. But the Department fails to explain why it could not palliate any such effects by administrative means, and in any event we must decline to place administrative convenience before constitutional legitimacy. Third, the Department claims "there is a chance" that imposing such a fee might cause an increase in the number of trucks that evade inspection. Speculation about a possible illegal response, of course, cannot justify an actual unconstitutional discrimination. Lastly, the Department asserts

---

additional funding to improve the overall quality of its program. Although the Department will continue to engage in "oversight and coordination with the USDA on inspections of international carriers, investigations of smuggling, and intensification of public awareness and education efforts," by its own admission the modified program will cost much less to operate. Because the amount of funding needed has thus been substantially reduced, it is reasonable to infer that the Legislature will be even more likely to fund the program from another, constitutionally legitimate source.

"there is a possibility" that imposing such a fee on carriers in domestic interstate commerce might cause them to complain that no fee is imposed on carriers in intrastate commerce. Again this is mere speculation, and hypothesizes a funding mechanism that the Department may or may not be able to justify under federal constitutional law if such a challenge ever materializes.

It follows that the Department has failed to bear its heavy burden, under the controlling decisions of the United States Supreme Court discussed above, of justifying its discriminatory fee structure by showing that its purpose " 'cannot be adequately served by reasonable nondiscriminatory alternatives.' " (*Oregon Waste, supra,* 511 U.S. ___, ___ [128 L.Ed.2d 13, 22, 114 S.Ct. 1345, 1351].)

We do not retreat from the rule that a motion for summary judgment should not be granted if there is a triable issue of material fact. (Code Civ.Proc., § 437c, subd. (c).) But as we have seen, in the case at bar none of the Department's proffered justifications raises such an issue; rather, each is insufficient on its face. Nor is this unusual: in the vast majority of reported decisions reviewing state statutes held to discriminate against foreign or domestic interstate commerce, the federal courts have rejected the state's proffered justifications as a matter of law. (See, e.g., *Oregon Waste, supra,* 511 U.S. ___, ___ [128 L.Ed.2d 13, 22-26, 114 S.Ct. 1345, 1351-1354]; *Chemical Waste, supra,* 504 U.S. 334, 342-348 [119 L.Ed.2d 121, 132-133]; *New Energy Co. of Indiana v. Limbach* (1988) 486 U.S. 269, 278-280 [100 L.Ed.2d 302, 311-312, 108 S.Ct. 1803]; *Bacchus Imports, Ltd. v. Dias, supra,* 468 U.S. 263, 270-273 [82 L.Ed.2d 200, 208-211]; *Hughes v. Oklahoma,*

supra, 441 U.S. 322, 337-338 [60 L.Ed.2d 250, 262-263]; *National Meat Ass'n v. Deukmejian*, *supra*, 743 F.2d 656, 661-663; *Cranberry Hill Corp. v. Shaffer* (N.D.N.Y. 1986) 629 F.Supp. 628, 634-635.)[15]

The Department has had ample and repeated opportunities – in the trial court, the Court of Appeal, and this court – to propose justifications that cannot be held insufficient as a matter of law, but it has been unable to do so; we see no reason to believe that on a further hearing it would succeed where it has heretofore consistently failed. The trial court correctly granted summary judgment to Pacific Merchant on the ground that the challenged provisions unjustifiably discriminate on their face against foreign commerce.[16] It is time to end this litigation and allow the Legislature to address the matter if it be so advised.

---

[15] Indeed, the United States Supreme Court has itself granted a motion for summary judgment in such a case. (*Wyoming v. Oklahoma*, *supra*, 502 U.S. 437.) There Wyoming, a major coal-producing state, challenged as a violation of the commerce clause an Oklahoma statute requiring that at least 10 percent of the coal used by Oklahoma electric utilities be mined in Oklahoma. The high court held that the statute was discriminatory on its face (*id.* at pp. 455-456 [117 L.Ed.2d at pp. 16-17]) and that Oklahoma's proffered justifications were insufficient as a matter of law (*id.* at pp. 456-459 [117 L.Ed.2d at pp. 23-26]). Exercising its original jurisdiction, the high court then decreed summary relief: "We deny Oklahoma's motion for summary judgment and grant that of Wyoming." (*Id.* at p. 461. [117 L.Ed.2d at p. 27].)

[16] In light of this conclusion we need not reach the additional issue whether the amount of the challenged inspection fee is excessive.

The judgment of the Court of Appeal is reversed.

LUCAS, C.J., KENNARD, J., ARABIAN, J., BAXTER, J., GEORGE, J., and WERDEGAR, J., concurred.

[No. C015630. Third Dist. Jan. 4, 1995.]

California Court of Appeal

[As modified Feb. 3, 1995.]

PACIFIC MERCHANT SHIPPING ASSOCIATION, Plaintiff and Respondent, v.
Henry VOSS, As Director etc., et al., Defendants and Appellants.

COUNSEL

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Walter Wunderlich, Assistant Attorney General, and Charles W. Getz IV, Deputy Attorney General, for Defendants and Appellants.

Lillick & Charles, R. Frederic Fisher and Lawrence N. Minch for Plaintiff and Respondent.

OPINION

DAVIS, J. – Plaintiff Pacific Merchant Shipping Association (Pacific Merchant), an unincorporated association of ocean carriers, filed this class action on behalf of its members to obtain a declaration that inspection fees collected by defendant Department of Food and Agriculture (Department)[1] violate the United States Constitution, to enjoin collection of the fees, and to recover damages

---

[1] The named defendants are Henry Voss and Islam Siddiqui, sued in their respective official capacities as director and assistant director of the Department. For ease of reference, we will simply refer to the Department as defendant.

resulting from the collection of the fees. The Department appeals from the judgment entered by the trial court in favor of Pacific Merchant. Finding the summary adjudication of facts on which the trial court rested its judgment to have been granted in error, we shall reverse the judgment and remand for further proceedings.

Background

As an urgency statute, the Legislature enacted the "California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act" (the Act) in 1990 (Stats. 1990, ch. 1612, § 1), adding sections 5350-5353 to the Food and Agriculture Code (undesignated section references will be to this code). Under these statutes, the Department "shall establish a program for the inspection of conveyances entering California through airport and maritime facilities to prevent the introduction into, or spread within, this state of pests." (§ 5350, subd. (a).) To this end, the Act required the Department to "maintain plant quarantine inspection stations at point of entry at airports and marine terminals. . . . " and to "establish a program for the dissemination of information at airports and marine terminals in order to provide the users of the facilities information regarding the pest control and quarantine requirements of this state." (*Id.*, subds. (b), (c).)

The Act mandated the Department to collect fees (to the extent authorized by federal law) from air and marine carriers for the use of airport or marine terminal facilities "for plant and animal pest inspection, quarantine, and eradication." (§§ 5351, subd. (a); 5352.) The Act also required the Department to establish a list of countries which it had reason to believe were potential sources of

exotic plant and animal pests. (§ 5352.) The Legislature prescribed a fee schedule of $85 per air carrier and $200 per marine carrier making their initial stop in California on a journey initiating outside the United States. (§ 5353, subds. (a), (b).) The fees collected pursuant to the Act were to be deposited in a special fund for the Department for use for the purposes of the Act. (*Id.*, subd. (e).) The Legislature ceded discretion to the Department to increase or decrease these fees by regulation "upon determining that the revenue received is inadequate or in excess of the amount needed to conduct an effective inspection program" with a maximum charge limited to three times the statutory fees. (*Id.*, subd. (f).)[2]

Pacific Merchant brought this action shortly after the program began in July 1991. To outline briefly the procedural course, the Department demurred to Pacific Merchant's First Amended Complaint, challenging Pacific Merchant's standing. The Court denied the demurrer and subsequently certified the class. Eventually, Pacific Merchant moved for summary judgment or adjudication of issues. The trial court issued a tentative ruling granting summary judgment on the ground the inspection fee discriminated against foreign commerce; after taking the matter under submission, the court accorded the Department the opportunity of presenting additional evidence justifying the discrimination. The trial court thereafter

---

[2] The Department has promulgated a regulation setting the inspection fees equal to those prescribed in section 5353 and providing for exemptions for particular flights or voyages where sufficient evidence is provided of adequate compliance with the Act. (3 Cal.Code Regs. § 3560.)

affirmed its tentative ruling. Reserving its right to challenge the trial court's ruling on appeal, the Department stipulated to a judgment declaring the inspection fees to be in violation of the Commerce Clause (U.S. Const., art. I, § 8), and to a trial on stipulated facts with respect to remaining damages issues. The trial court entered judgment in April 1993.

The Summary Adjudication Motion

At the outset of its brief in the trial court, Pacific Merchant stated, "This motion is based *solely* on issues of law. Plaintiff['s] fundamental position is that the statutory fees *on their face* violate the Commerce Clause (U.S. Const., Art. I, § 8). The alternative constitutional grounds also urge facial invalidity of the statutory fees and issues of law. To the extent that the alternative grounds also address Defendant['s] actual administration of the statute, Plaintiffs rely only on facts that have been stated under oath by Defendant." (Original emphasis.) Laying out its legal theory, Pacific Merchant asserted as its primary ground a violation of the Commerce Clause because the Act "on its face discriminated against foreign commerce by imposing fees on vessel inspection only in foreign commerce while providing free inspections in domestic commerce." As alternative grounds, "this motion urges that the statutory fees as a matter of law violate the Tonnage Duty, Commerce, and Export/Import Clauses of the Federal Constitution [Art. I, § 10, cl. 3; § 8,

cl. 3; and § 10, cls. 2] and the GATT Treaty[3] because the fees imposed do not even purport to reflect any allocation of Defendant's cost burden to both foreign and domestic commerce, convey no benefit on vessels[,] and . . . exceed Defendant['s] actual costs of inspecting vessels." Finally, Pacific Merchant claimed the fees "violate the Supremacy Clause of the Federal Constitution because they conflict with a federal statute restricting concurrent State jurisdiction over border quarantine/inspection of transport conveyances like vessels to *domestic* commerce. (7 U.S.C. § 161 (First Proviso))." (Italics original.)

Pacific Merchant adduced the following facts with respect to the Department's inspection programs which are not disputed. The Department has established a list of pests with origins in the United States and its territories which are the basis for enforcement of intrastate and interstate quarantines; however, for pests originating outside the United States, the Department relies on federal quarantines. The introduction of any of these pests would have a significant economic impact on the state's agricultural industry. According to excerpts of the depositions of Department officials, the Department conducts inspections of various instrumentalities of domestic interstate commerce, imposing a fee only for the destruction of infected goods (collecting no more than $20,000 in a

---

[3] "GATT" is the acronym for the General Agreement on Tariffs and Trade. While the GATT treaty is presently a focus of attention in current events, it plays no part in the resolution of this case. Hence, there is no need to expand our explanation beyond identifying the acronym.

typical year).[4] The Department will inspect aircraft (but not their contents, which are subject to inspection by county departments) to check for Japanese beetles. Rail carriers are inspected if there is reason to believe there is a suspect cargo (although the frequency or nature of these inspections is not specified). Ships are subject to inspection, and have been inspected (although again the frequency is not specified). This brings us to trucks, which are also inspected and are the instrumentality on which Pacific Merchant most directly focused. These inspections are performed at 16 border stations owned, operated, and staffed by the state of California. In contrast, the Department does not maintain any state inspection facilities at marine and air terminals, or at the Mexican border. Instead, the federal Department of Agriculture (USDA) is responsible for pest inspections of international arrivals. Inspections are performed almost entirely by USDA inspectors.

In order to defray the costs of the inspection program created by the Act, inspection fees are payable by all planes and vessels originating outside the United States from a listed quarantine area which are making their first

---

[4] The Department officials stated the Department participated in inspections of intrastate commerce along with county agricultural departments. These applied to trucks, railroads, aircraft, and cars (the latter only if a special quarantine were in effect). While the Department does not impose fees for these inspections, apparently the counties impose fees if they take place outside normal work hours or for destruction of contaminated goods (although the Department was unfamiliar with the manner or amount of fees charged by the various counties).

United States port of call in California. With respect to ships, passengers and crew are inspected on board; the cargo is generally inspected at warehouses in the privately-owned marine terminals. Pursuant to a memorandum of understanding between the Department and the USDA, the state subsidizes the costs of additional federal inspectors (and their overhead) at both sea and air facilities. In the particular year for which Pacific Merchant requested information, the cost of the additional inspectors pursuant to the agreement with the USDA was $2.4 million. This resulted in the hire of 7 additional marine inspectors and forty-four additional air inspectors.

Pacific Merchant also adduced a number of financial facts relating to the inspection programs which are generally undisputed. In the particular fiscal year for which Pacific Merchant obtained information, the total amount of inspection fees collected from vessels and planes under the Act amounted to $4.3 million. In addition to the 51 inspectors hired pursuant to the $2.4 million agreement with the USDA, the inspection fees also funded a $1 million public information program, $660,000 in overhead (charged as a percentage by the state of California against all state programs), $164,000 for investigations, and $100,000 for "blitzes" (periods of intense inspection of every incoming vessel).[5] In comparison, the total costs for the Department's pest-exclusion division (exclusive of

---

[5] Although the parties elsewhere dispute the total costs of the air and marine inspection program, this is the result of Pacific Merchant relying on data from one fiscal year while the Department relies on data from a different fiscal year. However, Pacific Merchant in fact relies on the Department's data as support for these financial facts.

foreign pests) were $10.8 million, with $8.4 million[6] devoted to the inspections of domestic interstate commerce.

In the opposition to the motion, the Department adduced evidence from its officials attesting to purported significant differences between the risks addressed by the domestic border inspections and the air and maritime inspections. They stated (in contradiction of Pacific Merchant's position) that foreign commerce presented a significantly greater danger than domestic commerce with respect to the risk of infestation, since there were 199 different countries with thousands of pests subject to federal quarantines, while there are only 37 domestic quarantines established by the Department. While trucks can be inspected at the border stations in 5 to 30 minutes, inspection of a ship and its cargo can take several days.

The Department represented that the Act was passed not as a means of raising revenue but for the purpose of protecting California agriculture from infestation. As found in an August 1991 blitz of all ships in a two-week period entering Los Angeles, 27 percent carried pests of some type. There had been a big increase in air and marine commerce, but the number of federal inspectors

---

[6] There is also a discrepancy with respect to this figure, with an answer to an interrogatory stating that "inspection activities, other than airport and maritime inspections, are performed . . . at a cost of $9.92 million" and a deposition response stating that "I would say about $8.4 million of the State of California general fund is being used in this effort of . . . domestic pest containment or prevention." The parties seem to have adopted the latter figure on appeal, however.

had not been commensurately increased. All fees collected support the air and marine inspection program and not the general fund; in fact, the program has a separate fund and line item in the budget from the rest of the Department. With the increase in staffing, inspectors were able to increase interceptions, but even with the augmentation they are able to inspect only 62 percent of ships. It was in part at the behest of the plaintiff that the Department structured the program as it did (making use of additional federal inspectors), since there were objections to a separate layer of state inspections.

Supplementing Pacific Merchant's description of the program in its motion, the Department noted marine carriers could obtain exemptions from inspections based on the nature of their cargo or their foreign ports-of-call. In the 16 months ending November 1992, 330 ships qualified for exemptions.[7] A significant amount of staff time is devoted to processing the requests for these exemptions. The Department has also established incentives for carriers willing to assist in education programs, with a 10 percent discount on fees in the first year and 20 percent in each following year in which the carrier continues to participate. While the Department has authority to reduce or increase the statutory inspection fee, there are no current plans to do so.

In connection with the costs of the program, the Department offered testimony that the public information materials were an important part of pest eradication

---

[7] Putting this number in perspective, there were 774 ships paying inspection fees during a three-month period.

because they reduced the number of passengers and crew bringing pests into the country and thus hopefully would expedite future inspections. Even though there were not a high percentage of pests found among the passengers and crew of ships, any one pest could pose a significant risk to California agriculture. The Department was unable to separate the costs of the public information program for air carriers from marine carriers. The Department noted that while the per-vessel charge was higher than the per-aircraft charge, the vastly larger number of aircraft meant the ships provided only 21 percent of the total fees recovered.

DISCUSSION

I. *The Negative Commerce Clause*

Remembering it is the summary adjudication of facts under review, we first set out the governing substantive law to be applied to Pacific Merchant's showing and the Department's opposition. Although our resolution of the matter terminates at an early point of the negative commerce clause analytic paradigm, we include its entirety for the guidance of the trial court on remand.

A. *Substantive Legal Principles*

While the Commerce Clause of the United States Constitution is a subject of endless fascination to constitutional scholars (as many a weary law student can attest), we do not intend to recapitulate the extensive

commentary that has developed on this subject, particularly that which has been penned saluting its purposes. Rather, we will stick to the pertinent cases.

"The Commerce Clause expressly gives Congress power '[t]o regulate Commerce with foreign Nations, and among the several States.' U.S. Const., Art I, § 8, cl. 3. It has long been understood, as well, to provide 'protection from state legislation inimical to the national commerce [even] where [the] Congress has not acted. . . . ' " (*Barclays Bank v. Franchise Tax Bd.* (1994) 512 U.S. ___ [129 L.Ed. 2d 244, 257, 114 S.Ct. 2268].) This latter aspect is termed the "dormant" or "negative" Commerce Clause. (*Oregon Waste Sys. v. Dept. of Env.* (1994) 511 U.S. ___ [128 L.Ed.2d 13, 20, 114 S.Ct. 1345].) Far from being an incidental emanation of the Commerce Clause, there is evidence the Framers considered the negative aspect to be the more significant. (*West Lynn Creamery v. Healy* (1994) 512 U.S. ___ ___, fn. 9, [129 L.Ed.2d 157, 166, 114 S.Ct. 2205].)

"[T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it 'regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.' . . . If [the latter], it is virtually per se invalid. By contrast, nondiscriminatory regulations that have only incidental effect on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' " (*Oregon Waste Sys. v. Dept. of Env., supra*, 511 U.S. at p. ___ [128 L.Ed.2d. at p. 21.) A court may find discrimination either on the face of legislation or in its effects (*Bacchus Imports, Ltd. v. Dias* (1984) 468 U.S. 263,

270 [82 L.Ed.2d 200, 208-209, 104 S.Ct. 3049]); moreover, even a lack of legislative intent to discriminate does not insulate a statute from challenge because "the evil of protectionism can reside in legislative means as well as legislative ends." (*Philadelphia v. New Jersey* (1978) 437 U.S. 617, 626 [57 L.Ed.2d 475, 483, 98 S.Ct. 2531].) It is immaterial as well that a statute discriminates only against a segment of interstate commerce rather than its entire spectrum. (*Fort Gratiot Landfill v. Mich. Dept.* (1992) 504 U.S. ___, ___ fn. 4 [119 L.Ed.2d 139, 148-149, 112 S.Ct. 2019].)

The challenger bears the initial burden of demonstrating the existence of discrimination. Of necessity, this includes the demonstration that the commerce with which the challenger seeks to compare itself is similarly situated. (Cf. *National Meat Assn. v. Deukmejian* (9th Cir. 1984) 743 F.2d 656, 660, aff'd. mem. (1985) 469 U.S. 1100 [83 L.Ed.2d 766, 105 S.Ct. 768] [must demonstrate tax discriminates between similarly situated participants in commerce].) Otherwise, the challenger could simply pick any other type of commerce not subjected to the same regulation and argue discrimination. Requiring the demonstration of similar situations avoids the proverbial apple-and-orange comparisons which cram facts into procrustean analyses ill-suiting them.

Once a court finds the existence of discrimination, the burden switches to the state to demonstrate a legitimate local purpose for the distinction in treatment which cannot be served by alternative nondiscriminatory means. (*Oregon Waste Sys. v. Dept. of Env., supra*, 511 U.S. at p. ___ [128 L.Ed.2d at p. 22]; *Chemical Waste Management v. Hunt* (1992) 504 U.S. ___ [119 L.Ed.2d 121, 132-133,

112 S.Ct. 2009]; *Hughes v. Oklahoma* (1979) 441 U.S. 322, 336-337 [60 L.Ed.2d 250, 261-263, 99 S.Ct. 1727].) A statute patently discriminating in its treatment of interstate commerce is subjected to the strictest scrutiny, requiring a *compelling* justification. (*Oregon Waste Sys., supra,* 511 U.S. at p. ___ [128 L.Ed.2d at p. 22]; *Kraft Foods v. Iowa* (1992) 505 U.S. ___ [120 L.Ed.2d 59, 69, 112 S.Ct. 2365]; *Hughes, supra,* 441 U.S. at p. 337 [60 L.Ed.2d at pp. 262-263].)

Discriminatory treatment is not, however, automatically fatal; it will be allowed if there is some reason *other than* the point of origin of the articles of commerce which affects either the health and safety of a state's citizenry or the integrity of its natural resources and there is no nondiscriminatory alternative. (*Maine v. Taylor* (1986) 477 U.S. 131, 148 n. 19, 151 [91 L.Ed.2d 110, 127, 129, 106 S.Ct. 2440]; see *Oregon Waste Sys. v. Dept. of Env., supra,* 511 U.S. at p. ___ [128 L.Ed.2d at p. 23]; *Chemical Waste Management v. Hunt, supra,* 504 U.S. at p. ___ [119 L.Ed.2d at p. 135]; *Philadelphia v. New Jersey, supra,* 437 U.S. at pp. 626-627, [57 L.Ed.2d at pp. 483-484].) This exception reflects the Supreme Court's long-standing recognition of a state's right to legislate in the interest of local health and safety, even if burdensome regulation is imposed on interstate commerce as a result. (*Maine, supra,* 477 U.S. at pp. 148 fn. 19, 151 [91 L.Ed.2d at pp. 127, 129]; *Hood & Sons v. DuMond* (1949) 336 U.S. 525, 533, 535 [93 L.Ed. 865, 871-872, 872-873, 69 S.Ct. 657].) In furtherance of this inherent police power, the state can both inspect the articles of interstate commerce *and* exact an inspection fee, which will be upheld so long as it reasonably relates to the costs of the inspection program. (*Texas Co. v. Brown* (1921) 258 U.S. 466, 474-475 [66 L.Ed. 721, 725-726, 42

S.Ct. 375]; *Pure Oil Co. v. Minnesota* (1918) 248 U.S. 158, 161-162 [63 L.Ed. 180, 187-189, 39 S.Ct. 35]; cf. *Great Northern R. Co. v. Washington* (1937) 300 U.S. 154, 160 & fns. 7, 9 [81 L.Ed. 573, 578, 57 S.Ct. 397] [fees to cover costs of regulating interstate public utilities]; see *South Carolina State H. Dept. v. Barnwell Bros.* (1938) 303 U.S. 177, 188 & fn. 5 [82 L.Ed. 734, 740-741, 58 S.Ct. 510]; compare *Hale v. Bimco Trading* (1939) 306 U.S. 375, 380 [83 L.Ed. 771, 776, 59 S.Ct. 526] [no rational basis for subjecting only out-of-state commodities to inspection and fees; fees exorbitant as well].) It is the burden of the challenger to demonstrate a fee is "manifestly disproportionate" to the service rendered. (*Clark v. Paul Gray* (1939) 306 U.S. 583, 599-600 [83 L.Ed. 1001, 1013-1014, 59 S.Ct. 744].)[8]

Because it engages in foreign interstate commerce, Pacific Merchant also attempts to invoke (as part of the pertinent substantive law) the oft-repeated cliche from *Japan Line, Ltd. v. County of Los Angeles* (1979) 441 U.S. 434 [60 L.Ed.2d 336, 99 S.Ct. 1813], in which the Supreme Court set out the analysis for *taxation* of foreign commerce: "[A]n inquiry more elaborate than that mandated

---

[8] We reject as nonexistent the distinction Pacific Merchant attempts to draw in Commerce Clause jurisprudence between "substantive regulatory program" cases and "fee/tax" cases. First, in attempting to draw this distinction, Pacific Merchant ignores the inspection-fee cases we have cited. Moreover, the "distinction" relates merely to the factual happenstances of the cases from which Pacific Merchant purports to draw this distinction and not any aspect of the legal reasoning fundamental to the cases. Pacific Merchant thus loses sight of the principle that the ratio decidendi of a case must be related to the facts before the court. (*In re Randy J.* (1994) 22 Cal.App.4th 1497, 1503 [28 Cal.Rptr.2d 152].)

by *Complete Auto Transit[, Inc, v. Brady* (1977) 430 U.S. 274 51 L.Ed.2d 326, 97 S.Ct. 1076)] is necessary when a State seeks to tax the instrumentalities of foreign, rather than interstate, commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions . . . , a court must also inquire, first, whether the tax . . . creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.' " (*Id.* at p. 451 [60 L.Ed.2d at p. 349] [italics supplied]; accord *Barclays Bank v. Franchise Tax Bd., supra,* 512 U.S. at p. ___, [129 L.Ed.2d at p. 264].) As refined in *Barclays Bank,* the "one voice" element must be demonstrated by *specific* indications of congressional intent to bar the challenged state regulation. (512 U.S. at p. ___ [129 L.Ed.2d at p. 266].) Although we question whether this element from a taxation case is even relevant to inspection fee cases, Pacific Merchant has not pointed to any such specific Congressional intent to preclude states from collecting regulatory fees from foreign commerce. This factor therefore forms no part of our analysis.

B. *Analysis*

We begin by casting aside the Department's efforts to establish the bona fides of the Legislature in enacting the challenged inspection scheme (part of which is the irrelevant argument that Californians engaging in foreign interstate commerce are not favored), or to point out that only a portion of foreign interstate commerce is encumbered. Under the authority cited above, both propositions are irrelevant: even the best-intentioned encumbrance of

only one aspect of foreign interstate commerce is impermissible if unjustified.

We must also reject the analytic paradigm Pacific Merchant has applied to the facts of this case, which led the trial court astray and resulted in relieving Pacific Merchant of its full burden on the summary adjudication motion. Pacific Merchant purports to lump all inspections performed by the Department into what it views as a single pest-prevention program, a view which allows it to posit facial discrimination in the statute at issue because it imposes fees only on certain inspections.[9] Were we to accept this characterization, Pacific Merchant would need to do little other than point to the waste disposal fee cases cited above (or cases in which taxes are imposed on one type of commerce and not another) and demand that the Department produce evidence demonstrating a compelling reason for charging fees for one and not the other. This would be a Sisyphean task for the Department, because fees imposed in discriminatory manner by a single program (or discriminatory fees and taxes unrelated to a substantive regulatory program) are inevitably stricken down.

This effort to leap past the requirement of demonstrating ships are similarly situated to unburdened commerce is unavailing, however. Unlike the waste-disposal

---

[9] Pacific Merchant does not challenge the inspections themselves as an impermissible burden on foreign interstate commerce, perhaps recognizing it follows directly from *Maine v. Taylor, supra,* that inspections are the least restrictive alternative furthering the compelling state interest of protecting its agricultural industry from non-native pests.

cases in which the high court was presented with a single regulatory program charging disparate fees (or cases where there are no regulatory programs at all), we here have an inspection program for ships (and planes) administratively and financially segregated from either the general fund or even the remainder of the Department's budget; in point of fact, the inspections themselves are even performed almost entirely by a different sovereign subsidized by California. The fact that inspections of air and marine carriers flow from the same general grant of legislative authorization to the Department as any other inspection (§ 5341) is immaterial; this power can flow into entirely discrete streams.

Since we have discrete regulatory programs under consideration, only one of which assesses the fees at issue, Pacific Merchant must thus initially demonstrate that the inspections of its ships are sufficiently similar to the other inspections taking place under the Department's other programs. Otherwise, its Commerce Clause challenge is limited (under the inspection-fee cases we have cited above (pp. 224-225, *ante*)) to demonstrating the extent to which the fees charged exceed the costs of the inspection program (in which case the excess is stricken down as a camouflaged revenue-raising method).[10]

Contrary to Pacific Merchant's offhand response to the Department's arguments in this regard, requiring it to

---

[10] As Pacific Merchant did not pursue this course, we will not discuss whether the inspection fees were "excessive" other than noting there are triable issues of material fact regarding the relationship of revenues and costs under the program (a subject addressed again at greater length in pt. II).

demonstrate "similar situation" does not simply shift to it the Department's "justification" burden. It is Pacific Merchant's initial burden to demonstrate discrimination. Although often unarticulated, it is an apriority to establishing "discrimination" that the categories under analysis are otherwise the same. Moreover, there are two different foci involved for the two issues: if Pacific Merchant shows the nature of inspections are essentially the same (and thus that discrimination exists), the Department must justify charging fees only under the ship and airplane program. Thus, the Department's evidentiary showing has been mischaracterized by Pacific Merchant and the trial court. It is not an effort to "justify" the discrimination by showing the inspections are unalike; it is instead a counter showing that there *is no* discrimination because the categories are not the same (and therefore need not be treated the same).

As a result, despite the highfalutin constitutional issues invoked in this appeal, all we need resolve are the mundane mechanics of the burdens in a summary adjudication motion. Aligning the evidence produced below in the proper substantive viewfinder, it is clear the evidence relating to the substantial-similarity component of discrimination, far from being uncontested, is hotly disputed between the parties. In Pacific Merchant's view, both programs simply look for the same pests, and an inspection of a ship is nothing more than a cumulation of 4000 trucks. The Department maintains there are different pests involved, and the magnitude of difference is of such a high order than [sic] the inspections are inapposite.[11] Faced

---

[11] Besides these issues of triable material fact in the comparison of the similarity of the truck and ship inspections,

with this primary dispute (and the subsidiary factual defect identified in the footnote), factual *findings* are required on the issue of similarity, which is not the office of a trial court on a summary adjudication motion and is certainly not a function for this court.[12] It may well be that if the nature of the inspections are substantially similar, charging fees for one and not the other is indefensible. But that is an issue we need not reach (and one on which we decline to offer an advisory opinion in the absence of facts). It is sufficient to hold the Department has satisfied its burden of demonstrating the existence of triable issues of fact regarding the presence of discrimination, so the trial court should have denied the motion.

II. *Other Grounds Raised Below*

In sketchy fashion, Pacific Merchant reasserts the invalidity of the statutory scheme on other grounds

---

for which at least there is some factual material in the record, we note Pacific Merchant has also attempted to invoke the other inspections performed by the Department without fee. However, as we noted in our earlier summary of these sparse materials filed in support of the motion, the deposition excerpts are a mere recitation of the categories of inspections and the absence of fees without any additional information as to the nature of these inspections, or even their frequency. This is insufficient to carry the burden of demonstrating inspections of Pacific Merchant's ships are similar to these other inspections of intrastate and domestic interstate commerce.

[12] As the Supreme Court has pointed out, involvement of Commerce Clause issues does not alter the fundamental premise that findings on disputed issues of fact are for the trial court and not the appellate court. (*Maine v. Taylor, supra*, 477 U.S. at pp. 144-145 [91 L.Ed.2d at pp. 124-125].)

raised by it in the trial court (which declined to consider them in light of its ruling on the negative Commerce Clause). The Department contends these issues are not properly before us.[13]

"A judgment correct under any applicable legal theory will not be reversed merely because the trial court followed an erroneous path of reasoning, but an appellate court will not employ a theory as grounds for affirmance where that theory rests on determinations of fact, the evidence on the facts was conflicting, and the conflicts are not resolved by the trial court." (*Cline v. Yamaga* (1979) 97 Cal.App.3d 239, 246-247 [158 Cal.Rptr. 598]; accord *Zak v. State Farm etc. Ins. Co.* (1965) 232 Cal.App.2d 500, 506 [42 Cal.Rptr. 908].) Thus, if Pacific Merchant's alternative theories involve disputed matters of fact, we cannot resolve them on appeal.

As we earlier noted, Pacific Merchant expressly agreed in the trial court (and now on appeal) that all of its remaining theories – other than federal preemption – involve resolution of the question whether the fees assessed substantially exceed the actual and necessary

---

[13] Hedging its bets, the Department invites this court in its reply brief to consider its *trial* brief in the event we reach the merits of these alternative grounds. Incorporating trial briefs by reference is an improper mode of appellate advocacy, which courts deem to be an abandonment of argument on an issue. (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334 [4 Cal.Rptr.2d 897]; see *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720-721 [151 Cal.Rptr. 229].) In light of the importance of this case to the legislative scheme, we will overlook this lapse on the part of the Department and not deem it to have abandoned any opposition.

costs to the Department of the inspection program. However, its showing in that regard was limited to calculating the percentage of new inspectors dedicated to marine inspection (13 percent), comparing this with the percentage of revenue generated by marine fees (21 percent), and asserting that the public information and overhead costs should not be borne by marine carriers. It also pointed to the fact ships are charged the fee whether or not they can actually be inspected.

Pacific Merchant has failed to present any cogent reason why we should limit the costs for which they should be responsible to the percentage of the contractual costs of the additional maritime inspectors. It is undisputed that all fees are expended and none are retained as revenue. While Pacific Merchant may claim that public information costs and overhead are not permissible expenses, the Department has produced evidence that public information is a necessary part of the program because it reduces the influx of pests and diminishes the need for future inspections, and *every* program in the state is asked to bear its share of the state's administrative expenses. As for the point that not every ship is inspected, the Department has produced evidence this is a function of insufficient inspectors, which would tend to prove the fees are insufficient to cover the actual costs. Finally, Pacific Merchant, in seeking to strike down the statute, ignores the effect of the express grant of authority to the Department to adjust fees to reflect costs as well as the Department's exemption program. Thus, the extent to which the expenses are actual and necessary, even if Pacific Merchant has sustained its burden, are disputed

questions of fact, meaning we cannot consider any theory based on them in the absence of trial court findings.

This leaves the federal preemption argument,[14] which is quickly dispatched. In *Oregon-Washington R. & Nav. Co. v. Washington* (1926) 270 U.S. 87 [70 L.Ed. 482, 46 S.Ct. 279], the Supreme Court held that Congress, in enacting the Plant Quarantine Act (7 U.S.C. § 151 et seq.) intended to occupy the field of interstate quarantines of plant diseases and pests, preempting state efforts to establish quarantines. (270 U.S. at pp. 101- 103 [70 L.Ed. at pp. 487-489].) Pacific Merchant attempts to rely on this decision to establish that the Department is precluded from regulating interstate commerce.

However, Congress immediately amended 7 United State[s] Code section 161 to divest the Plant Quarantine Act of its preemptive effect, "restor[ing] to the states full police power to impose a quarantine on any articles not specifically interdicted by a federal quarantine." (*Guam Fresh, Inc. v. Ada* (9th Cir. 1988) 849 F.2d 436, 438.) "A Congressional intent to allow state regulation to co-exist with federal authority is also implicit in . . . related statutes aimed at controlling and eradicating plant and animal diseases and pests. For example, 7 U.S.C. § 450

---

[14] In a scant paragraph's "argument," Pacific Merchant requests we take judicial notice of a trial court decision invalidating the Act as applied to air carriers and then affirm the judgment on the ground it would violate equal protection to apply the Act only to marine carriers and not air carriers. As the trial court judgment has been stayed by the Second District pending appeal (in a decision of which the Department requests we take judicial notice), we reject this argument, whatever its merits, as premature.

(1982) authorized the Secretary to cooperate with state departments of agriculture '[i]n order to avoid duplication of functions, facilities, and personnel. . . . ' [ ] Such provisions are inconsistent with the argument that federal law displaces state regulation in this area; rather, it is clear the Congress contemplated a statutory scheme in which state regulation *supplements* federal law, by restricting the entry of pests of peculiarly local concern." (*Ibid.*)

Pacific Merchant has overlooked this decision and the related statute cited in it (7 U.S.C. § 450).[15] Nothing about the Act conflicts with a federal quarantine. Indeed, the Department has specifically stated it is enforcing only federal quarantines in interstate commerce. The Act otherwise seeks to work in cooperation with the federal quarantines. Consequently, the preemption argument is without merit.

Disposition

The judgment is reversed and the matter remanded with direction to enter a new order denying Pacific Merchant's summary adjudication motion. The Department shall recover costs of appeal.

SPARKS, Acting P.J., and NICHOLSON, J., concurred.

---

[15] Pacific Merchant claims the failure to amend 7 United States Code section 160 (which authorizes the USDA to establish quarantines for foreign commerce) as well leaves states powerless to inspect foreign commerce. It provides no authority for this proposition, which is inconsistent with *Guam Fresh, Inc.'s* holding that the amendment was to apply to the *entire* federal act (abrogating the Supreme Court's holding that had applied to the *entire* federal act).

CALIFORNIA FOOD AND AGRICULTURE CODE

§ 5350. Inspection program at airports and maritime facilities

(a) The director shall establish a program for the inspection of conveyances entering California through airport and maritime facilities to prevent the introduction into, or the spread within, this state of pests.

(b) The director shall maintain plant quarantine inspection stations at points of entry at airports and marine terminals pursuant to Section 5341.

(c) The director shall establish a program for the dissemination of information at airports and marine terminals in order to provide the users of the facilities information regarding the pest control and quarantine requirements of this state.

(d) The director may authorize the inspection and certification of conveyances outside the state if the director finds that the inspection and certification meets the standards established for in-state inspection and certification programs and, for that purpose, may enter into any agreements necessary with any other state or the federal government. The director may provide that conveyances inspected and certified pursuant to this subdivision are not required to be inspected at California airports or marine terminals.

(e) The functions of this section shall be performed by the Division of Plant Industry, Pest Exclusion Branch, of the department, and the duties shall be performed by plant quarantine officers.

§ 5351. Service charge on air carriers

(a) The director shall levy a service charge, to the extent authorized by subsection (b) of Section 1513 of Title 49 of the United States Code, based on the schedule established pursuant to Section 5353, on each air carrier or foreign air carrier engaged in foreign air commerce, as those terms are defined by Section 5353, for the use of airport facilities for plant and animal pest inspection, quarantine, and eradication.

(b) For the purposes of this section, "airport facilities" means those airports owned or operated by any public entity.

§ 5352. Fees on commercial marine carriers

To the extent permitted by federal law, the director shall levy a fee on commercial marine carriers, based on the schedule established pursuant to Section 5353, for the use of marine terminal facilities for plant and animal pest inspection, quarantine, and eradication. The director shall identify and establish a list of countries which the director has reason to believe are potential sources of exotic plant and animal pests.

§ 5353. Schedule of fees for air and marine carriers

(a) Each air carrier or foreign air carrier engaged in foreign air commerce which carries animals or plants or other materials which are, or are likely to be, infected or infested with any pest shall pay a charge of eighty-five dollars ($85) to the director upon the initial landing in

this state of each flight of the carrier which originates outside the United States.

(b) Each commercial marine carrier engaged in foreign commerce which carries animals or plants or other materials which are, or are likely to be, infected or infested with any pest shall pay a fee of two hundred dollars ($200) to the director upon the initial arrival in this state of the carrier on a voyage which originated outside the United States from a country identified and listed by the director pursuant to Section 5352, or which made an intermediate stop on that voyage in a country identified and listed by the director pursuant to Section 5352.

(c) Each such carrier shall maintain records, which shall be subject to inspection by the director, and pay the charges and fees prescribed by this section in accordance with a procedure adopted by the director, by regulation.

(d) Each such carrier who fails to pay the charges and fees required pursuant to this section and the regulations adopted pursuant to this section is subject to a penalty of 2 percent on the amount of the unpaid charge or fee for each month, or portion thereof, that the charges or fees are not paid.

(e) The charges and fees collected pursuant to this section shall be deposited in the Department of Food and Agriculture Fund and shall be used by the director for the purposes of this section and Section 5350.

(f) The director may, by regulation, increase or decrease any of the charges or fees prescribed in subdivision (a) or (b) upon determining that the revenue received is inadequate or in excess of the amount needed to conduct an

effective inspection program. The maximum adjusted charge or fee shall not exceed three times the amount of the charge or fee specified in subdivision (a) or (b).

(g) The director may contract with federal and state agencies and with county agricultural commissioners to assist the director in carrying out the purposes of this section and Section 5350.

(h) The regulations adopted by the director pursuant to this section shall be deemed to relate to rates for purposes of Section 11343 of the Government Code and are not subject to review, approval, or disapproval by the Office of Administrative Law pursuant to Article 6 (commencing with Section 11349) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.

(i) "Air carrier," "foreign air carrier," and "foreign air commerce", as used in this section, and Section 5351 shall have the same meaning as specified in subsections (3), (22), and (23), respectively, of Section 1301 of Title 49 of the United States Code.

United States Code

21 U.S.C. § 136a. Collection of fees for inspection services

(a) Quarantine, inspection and transportation fees

(1) Quarantine and inspection

(A) In general

The Secretary of Agriculture (hereafter referred to in this section as the "Secretary") may prescribe and collect fees to cover the cost of providing agricultural quarantine and inspection services in connection with the arrival at a port in the customs territory of the United States, or the preclearance or preinspection at a site outside the customs territory of the United States, of an international passenger, commercial vessel, commercial aircraft, commercial truck, or railroad car.

(B) Airport inspection services

For airport inspection services, the Secretary shall collect no more than $69,000,000 in fiscal year 1992 and $75,000,000 in fiscal year 1993 from international airline passengers and commercial aircraft operators.

(C) Commercial truck and railroad car inspection services

For commercial truck and railroad car inspection services, the Secretary shall collect no more than $3,667,000 in fiscal year 1992 and $3,890,000 in fiscal year 1993 from commercial truck and railroad car operators.

(D) Costs

Fees, including fees from international airline passengers and commercial aircraft operators, may only be collected to the extent that the Secretary reasonably estimates that the amount of the fees are commensurate with the costs of agricultural quarantine and inspection services with respect to the class of persons or entities paying the fees. The costs of such services with respect to passengers as a class includes the costs of related inspections of the aircraft.

(2) Treasury

Any person who collects a fee under this subsection shall remit such fee to the Treasury of the United States prior to the date that is 31 days after the close of the calendar quarter in which such fee is collected.

(3) Agricultural quarantine inspection user fee account

(A) Establishment

There is established in the Treasury of the United States a no-year fund, to be known as the "Agricultural Quarantine Inspection User Fee Account" (hereafter referred to in this section as the "Account"), for the use of the Secretary for quarantine or inspection services under this section.

(B) Amounts in account

(i) Deposits

All of the fees collected under this subsection shall be deposited in the Account.

(ii) Reimbursement

The Secretary of the Treasury shall use the Account to provide reimbursements to any appropriation accounts that incur the costs associated with the administration of this subsection and all other activities carried out by the Secretary at ports in the customs territory of the United States and at preclearance or preinspection sites outside the customs territory of the United States in connection with the enforcement of the animal quarantine laws. Any such reimbursement shall be subject to appropriations under clause (v).

(iii) Procedure

The Secretary of the Treasury shall make reimbursement under clause (ii) on a quarterly basis. Amounts required to be reimbursed under clause (ii), shall be made on the basis of estimates made by the Secretary of the expenses described in clause (ii) that are incurred by the Secretary in the 3-month period immediately preceding such reimbursement.

(iv) Adjustments

Adjustments of reimbursements made under clause (ii) shall be made to the extent necessary to correct prior estimates that were in excess of, or less than, the amount required to be reimbursed under clause (iii).

(v) Authorization of appropriations

There are authorized to be appropriated each fiscal year amounts in the Fund

for use for quarantine or inspection services.

(4) Adjustment in fee amounts

Subject to the limits set forth in paragraph (1), the Secretary shall adjust the amount of the fees to be assessed under this subsection to reflect the cost to the Secretary in administering such subsection, in carrying out the activities at ports in customs territory of the United States and preclearance and preinspection sites outside the customs territory of the United States in connection with the provision of agricultural quarantine inspection services, and in maintaining a reasonable balance in the Account.

(b) Omitted

* * *

(d) Regulations

The Secretary may prescribe such regulations as the Secretary determines necessary to carry out the provisions of this section.

* * *

(f) Definitions

(1) Animal quarantine laws

For purposes of this section, the term "animal quarantine laws" means –

(A) section 306 of the Tariff Act of 1930 (19 U.S.C. 1306);

(B) sections 6 through 10 of the Act of August 30, 1890 (26 Stat. 416, chapter 839; 21 U.S.C. 101-105);

(C) section 2 of the Act of February 2, 1903 (32 Stat. 792, chapter 349; 21 U.S.C. 111);

(D) the Act of May 29, 1884 (23 Stat. 32, chapter 60; 21 U.S.C. 112 to 114a-1, 115, 117-119, and 130) (commonly known as the "Animal Industry Act");

(E) the Act of February 28, 1947 (61 Stat. 7, chapter 8; 21 U.S.C. 114b, 114c, and 114d-1);

(F) the Act of June 16, 1948 (62 Stat. 458, chapter 477; 21 U.S.C. 114e and 114f);

(G) Public Law 87-209 (21 U.S.C. 114g and 114h);

(H) the Act of May 31, 1920 (41 Stat. 699, chapter 217; 21 U.S.C. 116);

(I) the Act of February 2, 1903 (32 Stat. 791, chapter 349; 21 U.S.C. 112 and 120-122) (commonly known as the "Cattle Contagious Diseases Act of 1903");

(J) the Act of March 3, 1905 (33 Stat. 1264, chapter 1496; 21 U.S.C. 123-127) (commonly known as the "Cattle Contagious Diseases Act of 1905");

(K) the matter under the heading "Bureau of Animal Industry" of the Act of June 30, 1914 (38 Stat. 419, chapter 131; 21 U.S.C. 128);

(L) section 101 of Public Law 92-73 (21 U.S.C. 129);

(M) the matter under the heading "Miscellaneous" of the Act of May 26, 1910 (36 Stat. 440, chapter 256; 21 U.S.C. 131);

(N) sections 1 through 6 and 11 through 13 of Public Law 87-518 (21 U.S.C. 134-134h); or

(O) any other Act administered by the Secretary relating to plant or animal diseases or

pests, other than the first section of Public Law 91-239 (21 U.S.C. 135).

(2) Customs territory

For the purposes of subsection (a), of this section, the term "customs territory of the United States" means the 50 States, the District of Columbia, and Puerto Rico.

(3) Person

For the purposes of this section, the term "person" means an individual, corporation, partnership, trust, association, or any other public or private entity, or any officer, employee, or agent thereof.

(4) United States

For the purposes of subsection (b) of this section, the term "United States" means the several States of the United States, the District of Columbia, Guam, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, and all other territories and possessions of the United States.

(5) Vessel

For the purposes of subsection (a) of this section, the term "vessel" does not include any ferry.

7 U.S.C. § 147a. Control and eradication of plant pests

Authority of Secretary of Agriculture

(a) The Secretary of Agriculture, either independently or in cooperation with States or political subdivisions thereof, farmers' associations and similar organizations, and individuals, is authorized to carry out operations or measures to detect, eradicate, suppress, control, or to prevent or retard the spread of plant pests.

Intergovernmental cooperation

(b) The Secretary of Agriculture is further authorized to cooperate with the governments of foreign countries, or the local authorities thereof, and with foreign or international organizations or associations, in carrying out necessary surveys and control operations in those countries in connection with the detection, eradication, suppression, control, and prevention or retardation of the spread of plant pests.

Cooperating foreign agency

(c) In performing the operations or measures herein authorized, the cooperating foreign country, State, or local agency shall be responsible for the authority necessary to carry out the operations or measures on all lands and properties within the foreign country or State other than those owned or controlled by the Federal Government and for such other facilities and means as in the discretion of the Secretary of Agriculture are necessary.

Definitions

(d) As used in this section –

(1) "plant pest" means any living stage of any insects, mites, nematodes, slugs, snails, protozoa, or other invertebrate animals, bacteria, fungi, other parasitic plants or reproductive parts thereof, viruses, or any organisms similar to or allied with any of the foregoing, or any infectious substances, which can directly or indirectly injure or cause disease or damage in any plants or parts thereof, or any processed, manufactured, or other products of plants;

(2) "living stage" includes the egg, pupal, and larval stages as well as any other living stage; and

(3) "State" includes the District of Columbia and the territories and possessions of the United States.

Rules and regulations

(e) The Secretary of Agriculture is authorized to promulgate such rules and regulations and use such means as he may deem necessary to provide for the inspection of plants and plant products offered for export or transiting the United States and to certify to shippers and interested parties as to the freedom of such products from plant pests according to the phytosanitary requirements of the foreign countries to which such products may be exported, or to the freedom from exposure to plant pests while in transit through the United States.

(f) Authorization of appropriations; fees, late payment penalties, and accrued interest

(1) Notwithstanding paragraph (2), there are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section. Unless otherwise specifically authorized or provided for in appropriations Acts, no part of such sums shall be used to pay the cost or value of property injured or destroyed.

(2) The Secretary of Agriculture is authorized to prescribe and collect fees to recover the costs of providing for the inspection of plants and plant products offered for export or transiting the United States and certifying to shippers and interested parties as to the freedom of such plants and plant products from plant pests according to the phytosanitary requirements of the foreign countries to which such plants and plant products may be exported, or to the freedom from exposure to plant pests while in transit through the United States. Any person for whom such an activity is performed shall be liable for payment of fees assessed. Upon failure to pay such fees when due, the Secretary of Agriculture shall assess a late payment penalty, and such overdue fees shall accrue interest, as required by section 3717 of Title 31. All fees, late payment penalties, and accrued interest collected shall be credited to such accounts that incur the costs and shall remain available until expended without fiscal year limitation. The Secretary of Agriculture shall have a lien for the fees, any late payment penalty, and any accrued interest assessed against the plant or plant product for which services have been provided. In the case of any person who fails to make payment when due, the Secretary of Agriculture shall also

have a lien against any plant or plant product thereafter attempted to be exported by such person. The Secretary of Agriculture may, in case of nonpayment of the fees, late payment penalty, or accrued interest, after giving reasonable notice of default to the person liable for payment of such assessments, sell at public sale after reasonable public notice, or otherwise dispose of, any such plant or plant product upon which the Secretary of Agriculture has a lien pursuant to this section. If the sale proceeds exceed the fees due, any late payment penalty assessed, any accrued interest and the expenses of the sale, the excess shall be paid, in accordance with regulations of the Secretary of Agriculture, to the owner of the plant or plant product sold upon the owner making application therefore with proof of ownership, within six months after such sale, and otherwise the excess shall be credited to accounts that incur the costs and shall remain available until expended. The Secretary of Agriculture shall, pursuant to regulations as prescribed by the Secretary of Agriculture, suspend performance of services to persons who have failed to pay such fees, late payment penalty and accrued interest.

7 U.S.C. § 150dd. Emergency measures by Secretary

Remedial measures or disposal by Secretary

(a) Except as provided in subsection (c) of this section, the Secretary may, whenever he deems it necessary as an emergency measure in order to prevent the dissemination of any plant pest new to or not theretofore known to be widely prevalent or distributed within and throughout the United States, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of, in such manner as he deems appropriate, any product or article of any character whatsoever, or means of conveyance, which is moving into or through the United States, or interstate, and which he has reason to believe is infested or infected by or contains any such plant pest, or which has moved into the United States, or interstate, and which he has reason to believe was infested or infected by or contained any such plant pest at the time of such movement; and any plant pest, product, article, or means of conveyance which is moving into or through the United States, or interstate, or has moved into the United States, or interstate, in violation of this chapter or any regulation thereunder: *Provided*, That this subsection shall not authorize such action with respect to any product, article, means of conveyance, or plant pest subject, at the time of the proposed action, to disposal under the Plant Quarantine Act.

(b) Additional remedial measures; payment of compensation; authorization of appropriations

(1) Whereas, the existence of a plant pest new to or not theretofore known to be widely prevalent or distributed within and throughout the United States on any premises in the United States would constitute a threat to crops, other plant life, and plant products of the Nation and thereby seriously burden interstate or foreign commerce, whenever the Secretary determines that an extraordinary emergency exists because of the presence of such plant pest on any premises in the United States, and that the presence of such plant pest anywhere in the United States threatens the crops, other plant life, or plant products of the United States, the Secretary may (A) seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of, in such manner as the Secretary deems appropriate, any product or article of any character whatsoever, or means of conveyance which the Secretary has reason to believe is infested or infected by or contains any such plant pest; (B) quarantine, treat, or apply other remedial measures to, in such manner as the Secretary deems appropriate, any premises, including articles on such premises which the Secretary has reason to believe are infested or infected by any such plant pest: *Provided*, That any action taken under clauses (A) and (B) shall be consistent with the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.]: *Provided further*, That such action may be taken under this subsection only if the Secretary finds

after review of measures taken by the State or other jurisdiction and after consultation with the Governor that the measures being taken are inadequate. Before any action is taken in any State or other jurisdiction under this subsection, the Secretary shall notify the Governor of the State or other jurisdiction, shall issue a public announcement and shall file a statement for publication in the Federal Register of the action the Secretary intends to take together with the findings and reasons therefor: *Provided*, That if it is not possible to make such a filing with the Federal Register prior to taking action, the filing shall be made within a reasonable time, not to exceed five business days, after commencement of the action. If the Secretary wishes to change any action previously taken under this subsection, the Secretary shall follow the procedure set forth in the preceding sentence. The cost of any action taken by the Secretary under this subsection shall be at the expense of the United States.

(2) The Secretary may pay compensation to producers and other persons for economic losses incurred by them as a result of the quarantine, destruction, or other action taken under the authority of paragraph (1) of this subsection. The determination by the Secretary of the amount of any compensation to be paid under this subsection shall be final.

(3) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this subsection.

(c) Ordering treatment or disposal by owner; procedure

Except as provided in subsection (d) of this section, the Secretary may order the owner of any product, article, means of conveyance, or plant pest subject to disposal under subsection (a) of this section, or his agent, to treat, apply other remedial measures to, destroy, or make other disposal of such product, article, means of conveyance, or plant pest, without cost to the Federal Government and in such manner as the Secretary deems appropriate. The Secretary may apply to the United States district court, or to the United States court of any Territory or possession, for the judicial district in which such person resides or transacts business or in which the product, article, means of conveyance, or plant pest is found, for enforcement of such order by injunction, mandatory or otherwise. Process in any such case may be served in any judicial district wherein the defendant resides or transacts business or may be found, and subpena for witnesses who are required to attend a court in any judicial district in such a case may run into any other judicial district.

(d) Other adequate action to prevent dissemination

No product, article, means of conveyance, or plant pest shall be destroyed, exported, or returned to shipping point of origin, or ordered to be destroyed, exported, or so returned under this section, unless in the opinion of the Secretary there is no less drastic action which would be adequate to prevent the dissemination of plant pests new to or not theretofore known to be widely prevalent or distributed within and throughout the United States.

(e) Compensation of owner for unauthorized disposal

The owner of any product, article, means of conveyance, or plant pest destroyed, or otherwise disposed of by the Secretary under this section, may bring an action against the United States in the United States District Court for the District of Columbia, within one year after such destruction or disposal, and recover just compensation for such destruction or disposal of such product, article, means of conveyance, or plant pest (not including compensation for loss due to delays incident to determining eligibility for movement into or through the United States or for interstate movement) if the owner establishes that neither this section nor the Plant Quarantine Act [7 U.S.C.A. § 151 et seq.] authorized such destruction or disposal. Any judgment rendered in favor of such owner shall be paid out of the money in the Treasury appropriated for plant disease and pest control activities of the Department of Agriculture.

7 U.S.C. § 150ee. Regulations and conditions

The Secretary may promulgate such regulations requiring inspection of products and articles of any character whatsoever and means of conveyance, specified in the regulations, as a condition of their movement into or through the United States, or interstate, and imposing other conditions upon such movement, as he deems necessary to prevent the dissemination into the United States, or interstate, of plant pests, in any situation in which such regulations are not authorized under the Plant Quarantine Act.

7 U.S.C. § 150ff. Inspections and seizures; warrants

Any properly identified employee of the Department of Agriculture shall have authority to stop and inspect, without a warrant, any persons or means of conveyance moving into the United States, and any plant pests and any products and articles of any character whatsoever carried thereby, to determine whether such persons or means of conveyance are carrying any plant pest contrary to this chapter and whether any such means of conveyance, products, or articles are infested or infected by or contain any plant pest or are moving in violation of any regulation under this chapter; to stop and inspect, without a warrant, any persons or means of conveyance moving interstate, and any plant pests and any products and articles of any character whatsoever carried thereby, upon probable cause to believe that such means of conveyance, products, or articles are infested or infected by or contain any plant pest or are moving subject to any regulation under this chapter, or that such persons or means of conveyance are carrying any plant pest subject to this chapter; to stop and inspect without a warrant any person or means of conveyance moving intrastate upon probable cause to believe that the person or conveyance is carrying any product or article subject to treatment or disposal under the provisions of this chapter or the regulations issued thereunder; and to enter, with a warrant, any premises in the United States, other than places which may be entered under section 167 of this title, to make any inspections and seizures necessary under this chapter. Any judge of the United States or of a court of record of any State, Territory or possession, or a United States magistrate, may, within his respective jurisdiction,

upon proper oath or affirmation showing probable cause to believe that there are on certain premises any products, articles, means of conveyance, or plant pests regulated or subject to disposal under this chapter, issue warrants for the entry of such premises to make any inspections or seizures under this chapter. Such warrants may be executed by any authorized employee of the Department of Agriculture.

7 U.S.C. § 160. Regulations by Secretary restricting importation from insect-infested locality; when quarantine effective

Whenever, in order to prevent the introduction into the United States of any tree, plant, or fruit disease or of any injurious insect, new to or not theretofore widely prevalent or distributed within and throughout the United States, the Secretary of Agriculture shall determine that it is necessary to forbid the importation into the United States of any class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products from a country or locality where such disease or insect infestation exists, he shall promulgate such determination, specifying the country and locality and the class of nursery stock or other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products which, in his opinion, should be excluded. Following the promulgation of such determination by the Secretary of Agriculture, and until the withdrawal of the said promulgation by him, the importation of the class of nursery stock or of other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the said promulgation from the country and locality therein named, regardless of the use for which the same is intended, is hereby prohibited; and until the withdrawal of the said promulgation by the Secretary of Agriculture, and notwithstanding that such class of nursery stock, or other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products be accompanied by a certificate of inspection from the country of importation, no person shall import or offer for entry into the United States from any country or locality specified in

such promulgation, any of the class of nursery stock or of other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products named therein, regardless of the use for which the same is intended: *Provided*, That the quarantine provisions of this section, as applying to the white-pine blister rust, potato wart, and the Mediterranean fruit fly, shall become and be effective on August 20, 1912.

7 U.S.C. § 450. Cooperation with State agencies in administration and enforcement of laws relating to marketing of agricultural products and control or eradication of plant and animal diseases and pests; coordination of administration of Federal and State laws

In order to avoid duplication of functions, facilities, and personnel, and to attain closer coordination and greater effectiveness and economy in administration of Federal and State laws and regulations relating to the marketing of agricultural products and to the control or eradication of plant and animal diseases and pests, the Secretary of Agriculture is authorized, in the administration and enforcement of such Federal laws within his area of responsibility, whenever he deems it feasible and in the public interest, to enter into cooperative arrangements with State departments of agriculture and other State agencies charged with the administration and enforcement of such State laws and regulations and to provide that any such State agency which has adequate facilities, personnel, and procedures, as determined by the Secretary, may assist the Secretary in the administration and enforcement of such Federal laws and regulations to the extent and in the manner he deems appropriate in the public interest.

Further, the Secretary is authorized to coordinate the administration of such Federal laws and regulations with such State laws and regulations wherever feasible. However, nothing herein shall affect the jurisdiction of the Secretary of Agriculture under any Federal law, or any

authority to cooperate with State agencies or other agencies or persons under existing provisions of law, or affect any restrictions of law upon such cooperation.

DANIEL E. LUNGREN
Attorney General
WALT WUNDERLICH
Assistant Attorney General
CHARLES W. GETZ, IV
Deputy Attorney General
455 Golden Gate Ave., Rm. 6200
San Francisco, CA 94102
Telephone: (415) 703-1308

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

PACIFIC MERCHANT SHIPPING ASSOCIATION, Plaintiff, v. HENRY VOSS, Director CALIFORNIA DEPARTMENT OF FOOD & AGRICULTURE; ISI A. SIDDIQUI, Assistant Director, DIVISION OF PLANT INDUSTRY; THE STATE OF CALIFORNIA; and DOES I-XX, Defendants.	No. 524434 DECLARATION OF ISLAM A. SIDDIQUI IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Date: 11/23/92 Time: 9:00 a.m. Dept: 28 Trial Date: 2/1/93

I, Islam A. Siddiqui, declare as follows:

1. That I am an Assistant Director of the California Department of Food and Agriculture and specifically in

charge of the Plant Pest and Quarantine Division of the Department. I have a doctorate degree from the University of Illinois in plant pathology which I obtained in 1969 and a masters in plant pathology which I obtained in 1966. Since 1969 I have been employed by CDFA and in the past have been employed as Branch Chief of Pest Detection and Emergency Projects (1981 and 1984). I have been involved in past pest eradication projects as a Supervisor and am very familiar with all facets of such projects, including funding. In my current position, I am responsible not only for such eradication and control projects, but also ultimately for administration of the Airport Maritime Inspection Program, which I understand is the focus of the lawsuit in question. I also have under my jurisdiction and authority the State Quarantine Program, the Exclusion Programs and various inspection programs including our State Border Inspection Station, which pest exclusion branch is administered by Martina Haleamau, whose deposition was taken in this case. I am familiar with the above subjects and each and every fact set forth in this declaration and if called could testify to them.

2. California faces a *severe* pest threat due to "foreign" commerce, that is commerce not from the continental United States or Hawaii and United States possessions. While domestic commerce does pose a threat to California, I cannot agree with the characterization made by the plaintiffs in this case that such domestic commerce poses a "significant" threat. In fact, any pest not endemic to California poses a significant threat to the California economy and the threat is dependent upon the pest, not the source. For example, Medfly is a voracious

pest affecting over 200 different species of plants and University of [C]alifornia studies have shown could adversely impact California's agricultural economy with damages literally a billion dollars annually. Medfly is not established in California, although in the past, infestations have occurred.

Another pest, gypsy moth, currently infests the eastern and northern parts of the United States. Gypsy moth does not exist in California. However, gypsy moth is occasionally introduced into California from sources, more than likely in the East and does pose a lesser threat due to the difference in range and reproductive practices of this pest.

Thus, it is impossible to make a blanket statement that inter-state or "domestic" sources of pests pose a threat to California more so than foreign sources. In fact, I am informed that almost 199 countries are the subject of some federal plant or animal pest quarantine and insofar as these pests do not exist in the United States (hence the federal quarantine) or do not exist in California, they pose a definite risk to California's agriculture.

3. The Airport Maritime Inspection Act, which I will refer to as the Act, is not a tax with revenues raised for general State purposes. Rather it is a service fee which is imposed on *certain* qualifying foreign vessels for the distinct purposes set forth in the Act. The purpose of this Act is part of a trend of "pay your own way", due to the economy and the increased threat of pest infestations from increasing commerce between California and the rest of the world. There has been a dramatic rise in the amount of air and ship traffic in California over the past

few years without a commensurate increase in federal and State inspectors necessary to protect California from introduction of exotic pests. An exotic pest is one which does not exist in California.

4. The purpose of the Act as I understand it is to increase the number of inspections performed on foreign vessels in order to greatly enhance our ability to *exclude* pests rather than have to spend California tax money on eradicating pests.

5. Eradication of an exotic pest, which historically has occurred in urban areas, can be an extremely expensive and controversial governmental action. For example, USDA and CDFA shared costs of *$62 million* to eradicate a Mediterranean fruitfly infestation in Southern California from 1989-90. That infestation took almost two years to eradicate at a great tax expense to California citizens and utilized tremendous resources of the State and federal government. The theory of exclusion is obvious – by preventing a pest from being introduced into California through inspections, education and enforcement of quarantine measures, California obviously does not incur the threat or cost of a major pest infestation.

6. Such inspections do *not* give a competitive edge to California produce. There is absolutely no evidence that the Act was intended to protect California's economic competitiveness. Rather, commodities are inspected to insure that they meet appropriate federal and State quarantine standards and *only* those commodities from locations where a quarantine exists (either a California quarantine under the Plant Pest Act or a federal quarantine) must be inspected.

7. Thus, the statement that I am informed plaintiffs have made that *all* ships in foreign commerce are subject to the Act is simply wrong. Under the very clear language of the Act, only ships carrying potential hosts for plant or animal pests and arriving from a foreign port which is the subject of a federal quarantine are subject to this Act. Not all ships are consequently subject to this Act.

8. Further, the California Act does not differentiate between United States registered ships (which may have California corporate owners or California homeports) and other ships. Rather the focus is on the threat – importation of host material from areas infested with an exotic pest, which pest does not exist in California.

9. In order to demonstrate the potential problems posed by the importation of plant and animal pest host material from other countries, I have included as Exhibit A, blitz data from a joint federal-state intensive inspection of maritime shipments, which occurred in 1991. A blitz is an intense inspection of ships over a specific period of time which is intended to cover 100 percent of all shipments, in order to determine the actual impact of those shipments. The data, which is self-explanatory, disclosed that a significant number of prohibited plant and animal pests were in fact being conveyed in foreign commerce. Unfortunately, even with the augmented staffing, which is addressed in the Declaration of Valerie Brown, there is not the possibility of inspecting each and every ship and each and every cargo.

10. Following adoption of the Act by the Legislature and a signature by the Governor, hearings were held by

the Department, under my general supervision, concerning how the Act should be implemented. It is my understanding and belief that representatives of the Pacific Merchant Shipping Association among other shipping industry spokepersons recommended that the Department not initiate its own two-tier inspection program, but use and augment the existing federal inspection program. In other words, it was felt by the shipping industry that creating a separate staff of State inspectors could result in duality of inspection by both the federal government and the State which would burden and disrupt shipping operations. Thus, many of the comments received urge the Department instead to use any funds raised to augment the federal inspection program, which is what the Director decided to do.

11. Thus, under the current plan, approximately seven additional maritime inspectors have been hired to augment the USDA inspectors already on-site. These new federal inspectors operate under funding provided by California pursuant to a memorandum of understanding with the federal government. I have attached a true and correct copy of that Memorandum as Exhibit B to this declaration.

12. Prior to the federal government entering into this agreement under the Act, the attorneys for the federal government carefully studied the Act and determined that it was lawful for USDA to accept this money and implement California's law. They do so as State cooperators, just as State inspectors act as "federal cooperators" for purposes of enforcing any federal quarantines.

13. I am informed that plaintiffs object to the enforcement of federal quarantines and point to the lack of parallel State quarantines. Under our interpretation of the Plant Pest Act, once the federal government has declared a quarantine, the State cannot also declare a quarantine but is preempted. Thus, it would make no sense for the State of California to impose quarantines on foreign countries. Rather, California inspects plant pest hosts entering from foreign or interstate sources where there is a quarantine to enforce California and federal quarantines.

14. The Act also does not apply to shipments from Hawaii, Guam or Puerto Rico. However, there is a pragmatic reason for this. In Hawaii, as an example, there is a comprehensive federal presence and program for pre-inspecting before departure passengers and cargo. Thus, it would make no sense for California to also inspect when those airplanes and ships arrive at a California port. Similar programs are in effect for Guam and Puerto Rico. However, to my knowledge, there is no ability of USDA to pre-clear ships in foreign ports and it would not be realistic to expect that USDA could do so. Hence, USDA inspects when the ship arrives and the extra personnel provided allow them to inspect more ships and commodities.

15. If a ship is pre-cleared at a first port-of-call, then it would not be subject to the Act. However, the Court should understand that this requires a complete inspection which normally would not occur. For example, a ship may arrive in Seattle and the ship itself may be inspected, but normally if the cargo is not off-loaded, the cargo would not be inspected until its final port-of-call. Thus,

the ship could be subject to the California fee for inspection since the cargo would be inspected, if that cargo contained qualifying plant materials from a quarantined origin.

16. The Court should also understand, however, that the likelihood of multiple fees for inspecting the same shipment is extremely unlikely. Once a shipment is examined and cleared, it would not be subsequently subject either to California's fee or any similar State fee, since it is has already been inspected. As long as a ship is completely inspected, including its cargo, California has no reason in requiring a further inspection fee.

17. California is examining the possibility of charging fees for inspecting *interstate* commerce. There are no border inspections involving *intrastate* commerce. *Intrastate* inspections for gypsy moth, for example, make no sense since gypsy moth does not exist in California. *Interstate* inspections for gypsy moth do make sense since gypsy moth occurs in the eastern [United] States.

18. As better discussed in the Declaration of Valerie Brown, the Director has also implemented a program for incentives which reduce the fees by 10 percent the first year and 20 percent thereafter as well as an exemption process whereby ships *have* received exemptions from paying the fee due to the nature of their cargo or ports-of-call.

19. Finally, I wish to [emphasize] there is no comingling of funds received. Every dollar received from the Act goes toward the program, which the Act authorizes. The program is to provide services to those engaged in foreign commerce and protect California's

health and safety. Although much has been made of the overhead charges and public relations component of the Act, in truth, the Act is fully funded by the charges and all expenditures are for purposes of administering the Act. There is a public relations component but this component is directed at ship, crew and passengers, and not at the general California populace. There is an overhead charge, but this overhead charge is in line with that which normally the State charges (15.2 percent which represents a combined CDFA charge of approximately 11 percent and a State charge of approximately 4 percent) and represents costs to administer the program. There is also a cost under the federal contract for providing the additional inspectors and support for those inspectors. There are no monies which are received which go for any other State program or into the State general fund. Indeed, a separate fund and separate line item is provided for this particular Act to ensure no co-mingling of funds.

I have read the foregoing and know it to be true and correct and so declare under penalty of perjury, based upon my own knowledge or official records available to me. Executed this 4th day of November, 1992, at Sacramento, California.

/s/ Islam A. Siddiqui
ISLAM A. SIDDIQUI

EXHIBIT A

STATE OF CALIFORNIA **(SEAL)**

DEPARTMENT OF FOOD AND AGRICULTURE

1991

LOS ANGELES MARITIME PORT INSPECTION BLITZ
(Long Beach/San Pedro)

BACKGROUND

During a two-week period from August 19-27, 1991, 28 federal, state and county inspectors performed an intensive inspection of containerized maritime cargo, galleys on shipboard, passenger baggage from cruise lines, crews' quarters and crew members coming into the Port of Los Angeles. These activities are usually performed by a staff of eight federal inspectors. Increased staffing allowed cargo normally considered to be an agricultural risk, such as foodstuffs, herbs and spices, grains, and handicrafts, to be inspected more thoroughly. Shipments usually spot-checked from the back of the van at the dock were completely unloaded and searched at bonded warehouses by teams of officers. In addition, inspectors searched miscellaneous cargo not normally targeted by the USDA. A state team reboarded ships within twelve hours of an inspection by a federal officer to determine if ships' crew continued to comply with quarantine regulations.

The luggage of passengers arriving from cruises to Mexico was inspected by a federal handler and a dog trained to locate fresh meat and produce. In addition, approximately 500 passengers from each arriving vessel (averaging 1700 passengers per voyage) were selected at random

for complete inspection of handheld baggage. Inspectors also searched the luggage of crew members leaving the ship for the day or long term.

RESULTS OF THE INSPECTION

Cargo. USDA inspectors targeted 586 containers during the two weeks of the blitz. Of these, 241 were completely unloaded for inspection and 143 required routine fumigation (106) or certification (37) as a condition of entry. Of the remaining cargo, a small number of vans (20) containing bulk cargo such as marble slabs were inspected on the dock at rates specified by federal protocols and 108 shipments were released after a review of the invoice revealed cargo of no agricultural interest. During the special inspection, crews also examined a number of miscellaneous shipments unloaded for inspection by other federal agencies, such as the Customs Service and Food and Drug Administration.

Combining agricultural and miscellaneous cargo, over 350 shipments containing more than six million pounds of cargo were unloaded and inspected. Of these, 13 shipments contained prohibited commodities or pests that resulted in rejection of all or part of the shipment. An additional six shipments were found to contain pests requiring fumigation of the cargo. Of the total number of 28 actionable pests or commodities intercepted from these shipments, 4 were from miscellaneous cargo not normally targeted by the USDA. Thirteen minor pests also were identified in maritime cargo. Cargo requiring action originated in China, Ecuador, Hong Kong, Indonesia, Korea, the Philippines, Sri Lanka, Taiwan, and Thailand, Crating

materials incidental to the commodities shipped also were found to contain prohibited pests.

Shipboarding. Federal inspectors boarded 50 vessels in order to check galleys for restricted commodities and adherence to regulations governing garbage handling. Twenty-four of the vessels had commodities of concern that were sealed in food lockers while the vessel was in port; 154 commodities in total were restricted. State inspectors reboarded 33 of the vessels and found continued compliance with federal regulations to be good. In only one instance a garbage violation resulted in a $250 fine.

Cruise Lines. The baggage of 7,089 passengers of cruise lines was inspected, yielding 117 interceptions of quarantined materials. While most of these commodities were reported to be U.S.-origin fruit from baskets on board ships, one passenger did carry a mango obtained from Mexico. When questioned, passengers were unaware of the existence of federal quarantines against fresh produce. Forty crew members had their luggage inspected. Crew members also were unaware of the prohibition of removing fruit from the ship. Inspection of the crews' quarters revealed that they were in possession of fruit that could have easily been taken ashore. During the inspection of crew members' luggage, no prohibited items were found. However, inspection of their hand-held baggage revealed that they were carrying prohibited fresh fruit off the ship.

CONCLUSIONS

The blitz proved to be very worthwhile, as it demonstrated that maritime ports are a significant pest pathway. It also substantiated that public information and education must be made a high priority to prevent the entry of serious plant and animal pests.

A comparison of this year's interception data with two weeks in August of the prior year showed the number of interceptions resulting from the intensified inspection was nearly the same as the prior year with normal staffing levels (28 in 1991 versus 29 in 1990). This may indicate that current federal protocols, consisting of a combination of invoice, tailgate and de-vanning inspections, are an effective deterrent to shipping prohibited or infested cargo into the U.S.

However, shipping remains a significant pest pathway. Of 586 targeted containers, 19 were found to have actionable pests or commodities. An additional 143 shipments required fumigation or certification as a condition of entry. Therefore, for these two weeks, 27 percent of normally targeted foreign shipments coming into the Port of Los Angeles carried pests or commodities requiring federal action.

In addition, some miscellaneous cargo, not normally inspected by federal staff at the port, contained federal and California action pests. This cargo, considered of marginal risk by federal and state inspectors, would be examined if additional staff were available. While results of this intensified inspection do not provide strong evidence that more cargo should be completely unloaded in order to increase interceptions, the increase in the

number of shipments will require additional staffing to maintain an adequate level of deterrence.

In regard to shipboard inspections of vessels, there appears to be good compliance with current USDA regulations governing the storage and handling of foodstuffs, and garbage on board vessels. These regulations continued to be observed after the departure of the federal officer. In only one case was fresh garbage left exposed on a deck after the initial inspection by the USDA.

Cruise lines present both a potential pest pathway and an educational opportunity. While fruit from gift baskets does not pose a risk to U.S. agriculture, the ignorance of the passengers and crew regarding quarantines does. It was noted that all passengers and crew members questioned were unaware of any quarantine restrictions on bringing food commodities from foreign countries into California. Visitors to foreign countries need to be informed of the dangers of bringing fresh produce back with them on their return. Mexico, in particular, harbors a number of pests of great concern to California and the U.S.

In summary, results from this intensive inspection period suggest that federally profiled cargo does present the highest risk of pest interception, although increased inspections of miscellaneous cargo by federal and state inspectors could improve the current system. However, due to the broad focus of this inspection, the results do not eliminate any possible avenues for smuggling prohibited commodities in maritime cargo. Future inspections will be directed at uncovering these pathways.

EXHIBIT B

REIMBURSABLE COOPERATIVE AGREEMENT
BETWEEN
STATE OF CALIFORNIA DEPARTMENT OF FOOD
AND AGRICULTURE (COOPERATOR)
AND THE
UNITED STATES DEPARTMENT OF AGRICULTURE
ANIMAL AND PLANT HEALTH INSPECTION SERVICE
PLANT PROTECTION AND QUARANTINE (SERVICE)

ARTICLE 1

The purpose of this Agreement is to strengthen the enforcement of Federal law pertaining to the exclusion of foreign agriculture diseases and pests at California ports of entry. California ports include international airports and maritime facilities at Los Angeles, San Diego and San Francisco.

ARTICLE 2

Authority exists under the Organic Act of 1944, as amended (7 USC 147a) for the Secretary of Agriculture to cooperate with States or political subdivisions thereof, farmers' associations, and similar organizations, and individuals to eradicate, suppress, control, or to prevent or retard the spread of plant pests and plant diseases.

Authority exists under the Talmadge-Aiken Act (7 USC 450) for the Secretary of Agriculture to enter into a cooperative arrangement with the States to administer and enforce Federal laws and regulations relating to the control and eradication of plant and animal diseases and pests whenever he deems it appropriate and in the public interest.

ARTICLE 3

The cooperating parties agree:

a. That the attached Work Plan and Financial Plan, outlining activities and expenditures for the enforcement of Federal law pertaining to the exclusion of agricultural diseases and pests, are to be funded solely by the Cooperator, and are incorporated into this Agreement by reference.

b. The provisions of this Agreement will not replace functions that are being conducted by the Cooperator but will supplement those activities and increase program benefits to all parties.

c. Government paid overtime will be closely monitored. Overtime staffing levels should not exceed regular-time staffing levels for the same tasks or similar workloads.

d. It is understood that funding provided by the terms of this Agreement will be utilized to augment rather than replace Federal inspection activities at California ports. The Cooperator will fund those positions identified in the Work Plan allocated to Los Angeles, San Francisco, and San Diego airport and maritime operations. Beginning in Fiscal Year 1992, the Cooperator will fund those activities and positions for which Federal funds are not available. In accordance with this understanding, except for emergency situations, when assigning program personnel from California ports to temporary duty (TDY) assignments outside the ports of San Francisco, San Diego, and Los Angeles, staffing levels will be maintained at not less than 80 percent of the

approved combined and augmented staffing level. In emergency situations, as determined by the Service's Western Regional Director, or a designated representative, should it become necessary to reduce staffing below the 80 percent level, the Assistant Director for California Department of Food and Agriculture, Plant Industries, or a designated representative, will be notified prior to taking any final action. The Cooperator will be provided with a monthly TDY staffing report.

e. The ratio of supervisory to officer positions shall remain consistent with the Service's national staffing guidelines and position classification regulations.

f. Specialized deterrent inspections, including blitzes (specialized intensified inspections for a limited duration to assess pest risk potential), funded under Article 3.a shall be performed at a level which will develop a strong deterrent to smuggling. Travel and overtime expenses incurred for specialized inspections will be paid by the Cooperator.

g. To jointly develop program performance standards and conduct program evaluations and quality control for those activities funded under Article 3.a on a quarterly basis.

h. That overhead will be assessed, by the Service, at 16.15 percent, the current rate computed for the Animal and Plant Health Inspection Service Program activities nationwide.

ARTICLE 4

The Cooperator agrees:

a. To designate in writing to the Service the Cooperator's authorized representative who shall be responsible for collaboratively administering the activities funded under Article 3.a of this Agreement.

b. To hire agricultural biologists to serve as State Coordinator(s) at California ports of entry to work with the Service's OIC regarding activities funded under Article 3.a.

c. To manage and supervise State Coordinator(s).

d. To reimburse the Service quarterly, in arrears, for all costs associated with the activities conducted under the terms of this Agreement, as outlined in the Financial Plan, except as excluded in Article 5.j. These costs include, but are not limited to, salaries and benefits for the additional personnel positions provided for under the terms of this Agreement; the initial purchase and the training of the detector dogs and their handlers; dog facilities; operational and maintenance costs associated with dog handling teams which are used in California; travel in California; costs associated with transferring of Supervisory personnel; and all other costs associated with the activities and positions described in the Work Plan. If for any reason this Agreement is terminated, unemployment compensation, the costs associated with termination and 50 percent of the cost of relocation of employees funded under the terms of this Agreement, will be reimbursed by the Cooperator.

e. To provide equipment, including vehicles, mutually determined to be necessary for the effective conduct of program activities outlined in the Work Plan and funded under Article 3.a. of this Agreement.

f. To reimburse the Service for the cost of New Officer Training provided to all new PPQ Officers, designated unpaid Federal employee(s), and to employees who replace resigned or terminated PPQ Officers, to be funded under Article 3.a. Additionally the Cooperator will reimburse the Service the costs associated with the training of new supervisors hired under the terms of this Agreement.

ARTICLE 5

The Service agrees:

a. To designate in writing to the Cooperator the Service's authorized representative who shall be responsible for collaboratively administering the activities funded under Article 3.a. of this Agreement.

b. To supplement its current staffing at California ports of entry by hiring additional PPQ Officers, funded under Article 3.a, to perform inspections on foreign origin aircraft, vessels, commodities, passengers, and other means of conveyance.

c. To manage and supervise Federal personnel hired under the terms of this agreement and funded under Article 3.a.

d. To designate the Cooperator's Program Manager and State Coordinators(s) as unpaid Federal employees(s), i.e., collaborator(s).

e. To provide New Officer Training to all new PPQ officers and designated unpaid Federal employees(s), i.e., collaborator(s), to be funded under Article 3.a.

f. To provide, for use by State Coordinators, all the appropriate Code of Federal Regulations and other information used by the Service for the proper inspection of foreign origin aircraft, vessels, passengers, commodities, and other means of conveyances that may harbor exotic agricultural plant and animal pests.

g. To provide the necessary office space for State Coordinator(s) in accordance with General Services Administration guidelines.

h. To provide weekly and monthly records identifying the number of Quarantine Material Interceptions, the number and kind of quarantine pests intercepted, and make them available for review. To provide the Airplane Inspection Record, PPQ-213, on a daily basis to the State Coordinator.

i. To submit, for payment, a quarterly invoice, itemized by expense category, to the Cooperator's Assistant Director in Sacramento, California. All costs will be broken down to identify the specific items being billed. The Cooperator reserves the right to perform billing audits.

j. To pay for personnel relocation and termination costs which arise for any reason other than the termination of this Agreement.

k. Its existent level of funding and staffing for performing inspections and related support services at California ports of entry shall not be reduced during the life

of this Agreement, except as specified in Article 3.d or when subject to a reduction in funds by the Service's Deputy Administrator. Should Federal funding be cut Regionwide for Agriculture Quarantine Inspection activities, California ports will be reduced no more than the percentage equal to the total Regional reduction.

ARTICLE 6

Pursuant to Section 22, Title 41, United States Code, no member of or delegate to Congress shall be admitted to any share or part of this Agreement or to any benefit to arise therefrom.

ARTICLE 7

This Agreement shall become effective upon date of final signature and shall continue to September 30, 1991, subject to renewal in writing by mutual agreement of the parties hereto from year to year. Further, this Agreement may be amended at any time by mutual agreement of the parties in writing. It may be terminated by either party upon a 60-day notice in writing to the other party. The Agreement is subject to the availability of funding to the Service or the Cooperator.

STATE OF CALIFORNIA
DEPARTMENT OF FOOD
AND AGRICULTURE
1220 N Street
Sacramento, California 95814

/s/ 6/25/91
Assistant Director Date
for Plant Industry

UNITED STATES DEPARTMENT
OF AGRICULTURE ANIMAL
AND PLANT HEALTH
INSPECTION SERVICE PLANT
PROTECTION AND QUARAN-
TINE
9580 Micron Avenue, Suite I
Sacramento, California 95827

/s/ _____ 6/25/91
Regional Director (Acting) Date
Western Region

FISCAL YEAR 1991
WORK PLAN
FOR
FOREIGN AGRICULTURAL PEST EXCLUSION
CALIFORNIA PORTS OF ENTRY

In compliance with Cooperative Agreement No. 12-34-85-0181-RA between the State of California Department of Food and Agriculture (the Cooperator) and the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine (the Service), this Work Plan sets forth the objectives, activities, and budget for the exclusion of foreign agricultural pests at California ports of entry.

I. Objectives and Need for Assistance

Exotic agricultural pests pose a serious economic threat to the agricultural industry in the United States

and, in particular, to California's $16 billion industry. These pests are destructive to a wide range of agricultural hosts, and are quickly transported into new territory by man. Detection and destruction problems combine to make living with these pests a costly proposition due to treatment requirements and market issues. The potential cost to the agricultural industry, as well as to the backyard grower and gardener, in terms of crop loss and pesticide use, could be devastating.

The primary objective of this cooperative effort is to enhance agricultural pest exclusion inspection activities at California ports of entry. This will be accomplished through the enforcement of Federal laws and regulations relating to the control and eradication of plant and animal diseases and pests. The Cooperator is willing to provide additional revenues to the Service to increase staffing at these ports of entry in order to meet this objective. This additional staffing will provide more complete coverage of all arriving passengers, conveyances, and cargo. An effective exclusion program means a reduction in emergency pest programs and related funding.

II. Results and Benefits Expected

Through an expanded exclusion program at California ports of entry, we will prevent exotic agricultural pests from entering and becoming established in California. Increased staffing will increase the potential for intercepting exotic agricultural pests, reducing the need for

costly pest eradication programs. The use of new technology, such as X-ray machines and dog detector teams, will be expanded.

III. Approach

A. Through additional staffing, foreign agricultural inspection activities will be expanded including;

1. Increased use of X-ray technology in cargo and baggage.

2. Increased use of K-9 teams in baggage, post offices, and cargo.

3. Development of quality control program for pest exclusions and special inspectional efforts such as "blitzes". A "blitz" is a special intensified inspection for a limited duration to assess pest risk potential.

4. Expanded monitoring of compliance agreements by the Agricultural Compliance Enforcement (ACE) teams.

5. Increased "profiling" teams at airports, i.e., teams of officers profiling passengers to determine agricultural risk using oral and visual means.

6. Increased random inspections of "miscellaneous" cargo, air and sea ports.

7. Increased post office presence through inspections.

8. Augmented data collection and analysis through computerization.

9. Increasing monitoring of all airport and sea port activities.

10. Develop backup plant pest identification specialists.

B. Resources Required

1. Personnel – Staffing at Los Angeles, San Francisco and San Diego, airport and maritime facilities, will be increased by 49 positions over the number of positions the Service had on April 1, 1991. These new positions will be allocated as Los Angeles (31), San Francisco (18), and San Diego (0). These positions will be filled with:

   a. New and/or relocated employees.

   b. Series, grade, and title include, but are not limited to:

      (1) GS-436-05/07/09, PPQ Officer

      (2) GS-436-11/12, Supervisor

      (3) GS-1801-05/07/09, PPQ Canine Officer

      (4) Temporary Employees

   c. This includes but is not limited to salaries, overtime, fringe benefits, uniform allowances, training, costs associated with transferring supervisory personnel and costs associated with the relocation and termination of personnel.

2. Travel within the State of California – Should travel be required, as a result of specialized deterrent inspections, expenses shall be supported from the State funds provided to the Service under the terms of this Agreement.

3. K-9 teams – State funds will be used by the Service to purchase and train dogs; to obtain dog facilities; and to pay operational and maintenance costs associated with the dog handling teams, which are used in California.

4. Supply, service, repair, lease and all costs associated with the conduct of the expanded program and as identified in the Financial Plan to this Agreement will be reimbursed to the Service by the Cooperator.

5. Equipment – Equipment, including vehicles, will be purchased by the Cooperator with State funds, as mutually deemed necessary, and will remain the property of the State.

C. Projection of Accomplishments to be Achieved.

1. Quantitative – With increased staffing, allowing expanded coverage at California ports of entry, it is anticipated that the number of agricultural infestations will be reduced as a result of significant increases in pest interceptions as evidenced by:

   a. Monthly Quarantine Material Interceptions (QMI) and Pest Interception Reports.

   b. Specific interception records of agricultural pests.

   c. Percentage total of QMI's /Pest Interceptions per number of inspections.

   d. Number of interceptions per number of passengers (ratio).

e. Enforce Federal laws and regulations relating to the control and eradication of plant and animal diseases and pests.

2. Non-quantitative accomplishments will include:

a. Develop specific in-house training kits (pathology, malacology, weed/seed, and entomology) for PPQ Officers.

b. Institute a quality control program.

c. Develop new inspectional methods.

D. Data Collection and Maintenance

1. Report of number of temporary duty assignments per port, per month, to be provided to the Cooperator.

2. Data identified in paragraph VI.C.1 above will be collected and maintained by the Officer in Charge (OIC) at each port.

3. Monthly reports will be compiled by the OIC in accordance with requirements and procedures of the Service, e.g., WADS Report; PPQ 280, Pest Interception Report; and monthly narrative.

4. Criteria to evaluate project:

a. Use previous year's pest interceptions, QMI's and cargo inspection, adjusted for seasonal changes, passenger flow, host availability, and biological considerations.

b. Increased inspection of host material.

c. Increased number of inspections of miscellaneous cargo.

d. More publicity as a result of increased media exposure.

e. Results of program activities will be compared with previous year results to determine if program needs are met, through the use of statistical data on a quarterly basis. These results will be considered successful if pest detections are significantly reduced in the State of California.

E. Contributing Parties Working on the Project

1. The Service's Personnel will perform the inspection program and provide support.

2. The OIC of each respective port will provide day-to-day operational direction.

3. The State Coordinator and OIC will work together to develop daily operational work plans and to resolve operational problems in a mutually acceptable manner.

F. Features impacting activity

1. Emergency programs reducing number of personnel.

2. Inadequate facilities for increased staffing.

V. Geographic Location

Activities will be conducted at the airport and maritime facilities in San Diego, Los Angeles, and San Francisco in the State of California.

DANIEL E. LUNGREN
Attorney General
WALT WUNDERLICH
Assistant Attorney General
CHARLES W. GETZ, IV
Deputy Attorney General
455 Golden Gate Ave., Rm. 6200
San Francisco, CA 94102
Telephone: (415) 703-1308

Attorneys for State Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ALASKA AIRLINES, INC., a corporation; AMERICAN AIRLINES, INC., a corporation; DELTA AIR LINES, INC., a corporation; NORTHWEST AIRLINES, INC., a corporation; and UNITED AIRLINES, INC., a corporation; Plaintiffs, v CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; HENRY J. VOSS, as Director of the California Department of Food and Agriculture; STATE OF CALIFORNIA; and DOES 1 through 20, inclusive, Defendants.	No. BC047104 DECLARATION OF JAMES R. REYNOLDS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND/OR SUMMARY ADJUDICATION OF ISSUES Date: October 19, 1992 Time: 8:30 a.m. Dept: 82 Trial Date: None Motion C/O: None Disc. C/O: None (Filed Oct. 13, 1992)

I, James R. Reynolds, declare as follows:

1. That I am Regional Director of the Western Region of APHIS-PBQ Branch of the United States Department of Agriculture. I have been with USDA for 17 years and two years as Regional Director of the Western Region. In that capacity, I am responsible for overseeing a number of programs involving protection of agriculture from exotic pest introduction in California and other areas within the western region. This includes the inspection functions of USDA-APHIS at international airports in California. I am familiar with the federal plant quarantine programs.

2. USDA entered into a cooperative agreement with the State of California under applicable federal authority authorizing such agreements to allow the hiring of additional inspection personnel to augment the USDA-APHIS inspection program. This cooperative agreement, a copy of which I understand is attached to plaintiffs' moving papers as Exhibit 3. The agreement is authorized under 7 U.S.C. sections 147a and 450, and its purpose is to strengthen the enforcement of federal law pertaining to the exclusion of foreign agricultural diseases and pests at California ports of entry.

3. Under the agreement, 53.5 additional inspector positions are authorized to be paid from State funds. Prior to the addition of these inspectors, we had the following permanent full-time inspectors, first-line supervisors and dog-handlers available at the international airports in California to perform inspection services.

Airport	First Line Supvrs.	Officers	Doghandlers
LAX	8	37	3
SFO	4	31	4
S.Jose	1	0	0

4. These figures obviously do not include inspectors for the maritime program or other personnel not directly involved in inspections or as management personnel. Given the thousands of international airplane flights every week entering California, even this number of positions is simply not adequate to insure 100 percent inspection of international flights arriving in California.

5. The additional positions have been valuable in assisting us to increase our presence. We have been able to perform additional inspections which otherwise would not be possible. Using Los Angeles as an example, we have seen a *marked* increase in results, shown by an increase of quarantine material interception and increase in penalties for violations of various federal quarantine laws. There is no doubt that additional interceptions have occurred as a result of this program, which increases protection for California and other agriculture of the United States.

6. The procedures we use in inspecting do not vary whether the funding source is State or federal. The same procedures are used for inspection of aircraft, cargo and passenger luggage. With the added resources provided by the State, we are able to inspect a greater percentage of arriving passenger and cargoes on international airplane flights.

7. Similarly there is no question that international airline flights create a pest pathway into California. Our inspection blitzes, the results of which I understand are being provided by Valerie Brown in a separate declaration, and daily inspections establish that pests can be and are introduced into California as a result of international airline operations. While cargo is not as big a pathway as passenger flights, all international flights pose a potential risk to California and U.S. agriculture.

8. All of our California airport inspection activities occur on airport premises and are a direct result of these flights. I believe these inspections benefit airlines in insuring that the airlines are not a conduit for pests into the United States which would adversely affect our agricultural economy.

I have read the foregoing and know it to be true and correct of my own knowledge or based upon official records in my custody and so state under penalty of perjury. Executed this 5th day of October, 1992, at Sacramento, California.

/s/ James R. Reynolds
JAMES R. REYNOLDS
Regional Director
Western Region
USDA-APHIS

DANIEL E. LUNGREN
Attorney General
WALT WUNDERLICH
Assistant Attorney General
CHARLES W. GETZ, IV
Deputy Attorney General
455 Golden Gate Ave., Rm. 6200
San Francisco, CA 94102
Telephone: (415) 703-1308

Attorneys for State Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

PACIFIC MERCHANT SHIPPING ASSOCIATION, Plaintiff, v. HENRY VOSS, Director CALIFORNIA DEPARTMENT OF FOOD & AGRICULTURE; ISI A. SIDDIQUI, Assistant Director, DIVISION OF PLANT INDUSTRY; THE STATE OF CALIFORNIA; and DOES I-XX, Defendants.	No. 524434 DECLARATION OF MARTINA HALEAMAU IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT Date: 11/23/92 Time: 9:00 a.m. Dept: 28 Trial Date: 2/1/93

I, Martina Haleamau, declare as follows:

1. That I am Chief of the Pest Exclusion Branch of the California Department of Food and Agriculture and

have held that position since 1990. I am responsible for supervision of the exterior program which has as part of it, the 16 agricultural border inspection stations. I am also responsible for implementation of the Airport Maritime Inspection Act, which I understand is the focus of this case. I am familiar generally with the laws of quarantine, quarantine practices and procedures, and if called could testify to the following.

2. There are tremendous differences between border station inspections of vehicular traffic and inspections of ships under the Airport Maritime Inspection Act. I would like to highlight some of those differences, and also address the reason why fees are charged under this *new* Airport Maritime Inspection Program and not under the domestic pest inspection program.

3. First of all, the border inspection stations obviously do not inspect ships or vessels. The purpose of the inspections are also markedly different. Border inspection stations enforce primarily California quarantines involving attempts to exclude *domestic* pests, i.e., pests found in other parts of the United States. We are currently enforcing approximately 37 such quarantines. Some 126 inspectors will physically inspect approximately 279,627 commercial trucks a year. The purpose of the inspection, as mentioned, is to enforce the approximately 37 different domestic quarantines and exclude pests which are established in other parts of the United States. It is important for the Court to understand that any foreign commodities which may be carried on these trucks, have *already* been subject to a U.S.D.A. inspection. Thus, we are *not* enforcing nor inspecting for foreign pests as our primary

responsibility. However, obviously if such a pest is discovered, we would take appropriate measures to prevent its introduction.

4. Only trucks which are carrying agricultural commodities are subject to inspections. This is somewhat similar therefore to the ship inspection program which only inspects ships carrying host materials from one of the foreign sources listed by the U.S.D.A. as having pests not found in the United States.

5. Trucks which are stopped for inspection generally can be inspected within a period of five minutes to thirty minutes, depending upon the extent of inspection. At this time, we do not charge a fee for those inspections and the Legislature has not authorized such a fee. The Court, however, should also understand that although general tax fund monies are used for these inspections, these domestic inspections have historically occurred without fee and have taken place for decades.

6. On the other hand, the Airport Maritime Inspection Program is a *new* program which is funded from compensatory fees charged the vessels subject to inspection, as the plaintiffs apparently have already correctly characterized. There are *no* funds available in my budget nor has the Legislature appropriated any funds which would allow the State to absorb the annual cost for ship inspections.

7. Ship inspections are inherently different (more difficult and more time consuming) than truck inspections in that they include an inspection of the vessel itself, as well as separate inspections that must be set up individually for any container of concern. Arrangements for

container inspections, including the actual inspection itself, may take from one to several days. Further, we do not utilize State inspectors for such inspections nor do we utilize State facilities, which means that we incur costs in having inspections performed by U.S.D.A. inspectors and paying for federal office space and overhead. The reason for using federal inspectors in part is because of industry comment (including the Pacific Merchant Shipping Association) urging the Director not to impose a two-tier inspection program which would utilize State personnel. Thus, we incur costs for the use of *federal* inspectors instead of allocating inspectors from our own staff to perform these inspections.

8. Another reason for using these federal inspectors is that no State quarantine is enforced under the Airport Maritime Inspection Act. Rather, we are attempting to exclude pests not found in California *or* the United States by the use of *additional* federal inspectors, then would otherwise be available without this Act, who inspect ships to enforce federal quarantines on approximately 199 countries and literally *thousands* of pests from those countries, including diseases. The primary focus, therefore, on these inspections is on pests originating from foreign countries and foreign borders, not found in the United States.

9. Thus, there are substantial differences between the inspections, the time involved in the inspections, and the purpose of the inspections. Again, domestic inspections do not involve commodities which are anticipated to contain potential foreign pests since all interstate loads have been pre-cleared by the U.S.D.A. Therefore, we are

inspecting only domestic-origin pests and any foreign loads which have been pre-cleared.

10. On the hand, in the foreign program, no loads have been "pre-cleared" by the U.S.D.A. and since the origin is not from within the United States, we are not looking for domestic pests but a much broader category of international pests and diseases which can literally number in the thousands.

11. California is currently undergoing a major fiscal crisis. As the Court is well aware, there was a substantial budget deficit in this last fiscal year, and projections are for another budget deficit for the current fiscal year. I do not believe therefore the State has the resources to absorb the costs of the foreign inspection program, since we are using federal inspectors in part for comity, and also since the federal inspectors are looking for pests which are the subject of federal quarantines. If the Department cannot collect user fees to perform these inspections, then the State will not be able to have these inspections performed by U.S.D.A. The State has no funding available absent these fees, to perform these inspections. Further, the State cannot reassign personnel from border stations, as we simply do not have sufficient personnel to cover both maritime inspections and border inspections. Even if we had, it is clear that the industry prefers a *single* inspection by a federal agent, and not a federal inspection followed by a State inspection. We believe that this would increase the burden on commerce, not lessen it.

12. The purpose of the Airport Maritime Inspection Act is to augment the federal inspection program and to protect California from importation of pests from other

parts of the world which are not currently in California or the United States. Inspections performed in California prior to this Act were not sufficient to handle increasing international traffic. This Act was passed to enable additional inspections by increasing the number of federal inspectors at California's ports. Thus, California was responding to increased pest risk and the danger that more cargo would go uninspected if additional resources were not provided. The Act and its fees reflect an attempt by California to both increase inspections and to fund an educational program directed at maritime employees, passengers, shippers, and recipients of maritime cargo informing them of the importance of agricultural quarantines, thereby reducing the number of illegal high-risk agricultural commodities brought into the State.

I have read the foregoing and know it to be true and correct of my own knowledge and so declare under penalty of perjury. Executed this 1st day of December, 1992, at Sacramento, California.

/s/ Martina Haleamau
MARTINA HALEAMAU
Branch Chief – Pest Exclusion
California Dept. of Food
and Agriculture

DANIEL E. LUNGREN
Attorney General
WALT WUNDERLICH
Assistant Attorney General
CHARLES W. GETZ, IV
Deputy Attorney General
455 Golden Gate Ave., Rm. 6200
San Francisco, CA 94102
Telephone: (415) 703-1308

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

PACIFIC MERCHANT SHIPPING ASSOCIATION, Plaintiff, v. HENRY VOSS, Director CALIFRONIA DEPARTMENT OF FOOD & AGRICULTURE; ISI A. SIDDIQUI, Assistant Director, DIVISION OF PLANT INDUSTRY; THE STATE OF CALIFORNIA; and DOES I-XX, Defendants.	No. 524434 DECLARATION OF VALERIE BROWN IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Date: 11/23/92 Time: 9:00 a.m. Dept. 28 Trial: 2/1/93

I, Valerie Brown, declare as follows:

1. That I am Program Supervisor for the Airport Maritime Inspection Program, which program is under the supervision of Martina Haleamau, who is Branch

Chief of the Pest Exclusion Branch and also under the supervision of Dr. Islam A. Siddiqui, who is Assistant Director of the California Department of Food and Agriculture. I am familiar with the Act, generally with how the Act operates, how inspections are performed and quarantines, both federal and State. If called I could testify to the following.

2. Under the Act, only one inspection is performed. I am aware of no situations in which "dual" inspections of the same commodities are performed. However, the Court should understand that a ship may be inspected such as the galley and other portions, to determine whether the crew or passengers have brought any plant or animal pest materials with them and a cargo may be separately inspected at a bonded warehouse or freight terminal.

3. The general procedure for inspections does not vary whether it is performed under "federal" law or under "state" law. When a cargo ship arrives, documentation must be provided concerning the manifest of the cargo carried by that ship. This is examined and a decision is made as to whether an invoice will be required for an individual shipment, and whether the cargo in those containers will be physically inspected either at the freight terminal or in a bonded warehouse. The ship is also subject to inspection.

4. For practical considerations, officers cannot inspect cargo in containers until they are off-loaded. Inspections take place either at the terminal or a bonded warehouse. The State has provided office space at the

Port for a "state coordinator", who oversees the implementation of the federal contract. The federal government charges the state a certain amount of overhead (16.15%), which is applied toward the administration of the contract and costs, such as facilities rental, for federal inspectors at the port.

5. The Act is administered, in part due to industry requests, through a contact with USDA. The Director felt that this would lessen the burden on foreign commerce by augmenting the federal inspection program, rather than by creating a separate tier of inspectors and support staff which in some ways might duplicate the federal effort. Thus, the Department has entered into a contract or memorandum of understanding with USDA to provide this additional personnel. I understand that a copy of this document is attached to the Declaration of Dr. Siddiqui. As a result of 53 additional inspector positions funded by the Act, that would not otherwise be available to the USDA, the staffing at the ports has increased by seven inspectors. Three of these inspectors are paid directly by State funds.

6. The additional inspectors will dramatically increase the ability to inspect ships. However, by no means is every single ship inspected. The percentage of ships actually boarded and inspected is 61.7 percent. This is in addition to over 40,190 cargo inspections which may occur whether or not the ship is actually boarded.

7. Although plaintiffs have suggested, according to our counsel, that airlines receive a greater percentage of services under the Act, since more inspectors are assigned to the air component of the program, in truth

this is simply not true. The maritime industry has paid only 21% of the total fees collected by the program because there are substantially more air flights than ship landings. As a result of funds collected by the program, the federal government has doubled the number of inspectors at the Port of Long Beach. The program has funded a "blitz" of maritime cargo and is meeting with major importers to inform them of plant quarantines applying to cargo shipped [on] marine carriers. State program staff also spends a significant amount reviewing the status of vessels that request exemptions. Thus, I believe that the maritime industry does receive its fair share of the benefits under the Act.

8. I also reject the contention made by plaintiffs that the services provided are not reflected in the fee charged. Every dollar collected goes toward the program. I have attached as Exhibit A, a graph which I understand may have been provided also as an exhibit by the plaintiffs which demonstrates how the money collected is expended. This chart illustrates the projected program expenditures for fiscal year 1992-1993. Over 55 percent of the monies collected are spent on inspections. 23 percent on public information, which I will explain *infra*. 15.2 percent is spent on administration and operations. 3.7 percent is spent on investigation and 2.3 percent is spent on blitzes.

9. As to public information, attached to my deposition testimony were copies of material which are provided to ships, crew and passengers in an attempt to educate them on California's requirements concerning plant and animal pests. These materials are provided in order to expedite future shipments into California and

discourage the introduction of exotic pests. They are not provided to "California citizens" or the general public, but are provided to those utilizing the ships. In addition, a news letter and report are published and provided to the maritime industry. Also, we have established amnesty bins at maritime ports and encourage passengers and crew to deposit any plant and animal pest hosts in those bins. This is a service therefore rendered directly to the industry.

10. The blitzes are important because they give us in effect a chance to intensely study shipping practices over a set period of time in order to determine how effective the normal inspection program is and what interception rate can be expected if 100 percent of the ships were inspected. Similarly, investigation is necessary in order to prepare cases and ensure that inspections are performed properly. The overhead charge reflects in part a charge by the federal government, and is consistent with the standard overhead rate for other State programs. I am informed and believe that approximately 11 percent is normally charged by CDFA for its overhead costs, with an additional 4 percent overhead charge is due to other State agency involvement in overseeing this program. Thus, the 15 percent overhead charge is a standard charge which is not imposed solely on this program.

11. There is also a reserve provided. All funds are collected in a separate line account for monies which are received from this program. In other words, none of the money received from this program is expended on any other State program. All of the money received goes to administer and implement this program.

12. According to our March 30, 1992 status report based upon one year of implementation of the Act, interceptions were increased due to a 68 percent increase in the staffing of the federal inspectors funded by the program. We have seen an increase in interceptions which removes potential threats to California and thereby the United States agricultural industries. Indeed, I am informed that James Reynolds, the U.S.D.A. program chief in California, has executed a declaration in a similar case challenging this Act as it applies to airlines, which will be provided to the Court, and has concluded in that declaration that this program does protect California and United States agriculture.

As part of this program, we have initiated an incentive program. For those marine operators who are willing to assist us with an education program, we offer a 10 percent discount on fees the first year and 20 percent thereafter as long as the program is maintained by them. This has been a beneficial component for both the industry and the State, reducing their obligations and allowing us to better inform those utilizing maritime commerce as to the federal and State quarantine. Further, the Director has implemented an exemption program which enables ships to avoid paying any fee if they can establish that their commodities pose no risk to California or that they do not originate from a port which is the subject of a federal quarantine, or have been completely cleared by USDA inspection in another port, prior to entry into California. For example, last quarter 774 vessels paid California fees. Since the beginning of the program, 330 vessels have been exempted from payment on the basis of minimal pest risk. Thus, this exemption program is working.

13. The fee under the Act must be paid whether or not the vessel is a United States or foreign vessel and is based solely upon the criteria set forth in the Act. We do not discriminate in favor of California-based vessels or California corporations in any manner. By that I mean there is no mechanism in the Act nor is there any administrative practice of *not* charging fees for California corporations but charging fees for foreign corporation.

14. As part of the program, an advisory committee has been created and I believe that a member of the Pacific Merchant Shipping Association sits on that advisory committee. The purpose of the committee is to provide input from industry to the Director on the manner in which the program is initiated. The Committee has been of material assistance in scoping the program and in assisting us in making sure that the program has the minimal impact on commerce.

15. I do not believe there is a risk of multiplicity of State charges if this Act is upheld. This Act is an *inspection* fee to protect California's health and safety and prevent introduction of pests which may lead to a massive eradication effort at public expense. If cargo and ships are inspected by USDA prior to arrival in California, there is simply no reason for California to further require inspection or payment of a fee. Thus, if Oregon adopted a similar scheme and fully inspected cargo and ships prior to arrival in California, California simply would not impose a second fee or require a second inspection. That is why we do not include Guam, Puerto Rico or Hawaii in the Act. Although Hawaii has Medfly, and Medfly poses a severe threat to California (and indeed the entire continental United States), the USDA

has an effective program to prevent pest introductions from cargos, ships or passengers by inspections, phytosanitary certifications, and permit programs. Thus, the Act does not apply to those ships simply because there is no threat posed by them.

I have read the foregoing and know it to be true and correct and so declare under penalty of perjury, based upon my own knowledge or information available to me. Executed this 5 day of November, 1992, at Sacramento, California.

/s/ Valerie Brown
VALERIE BROWN

No. 95-1568

Supreme Court, U.S.
FILED
APR 29 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ANN M. VENEMAN, Secretary, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; ISLAM SIDDIQUI, Assistant Director, CALIFORNIA DIVISION OF PLANT INDUSTRY; STATE OF CALIFORNIA,

Petitioners,

vs.

PACIFIC MERCHANT SHIPPING ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS G. MINDER
MINDER & MURO
2710 Gateway Oaks Drive
Suite 200, South
Sacramento, California 95833

R. FREDERIC FISHER
Counsel of Record
DAVID F. SMITH
SHER & BLACKWELL
555 Montgomery Street
Suite 1100
San Francisco, California 94111
(415) 788-9150

Attorneys for Respondent

8763
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

COUNTERSTATEMENT OF QUESTION PRESENTED

Is a state statute that imposes inspection fees on ocean and air carriers in foreign commerce, but not on carriers of all types in domestic interstate and intrastate commerce that are inspected at substantially higher overall cost to the state, discriminatory and violative of the Commerce Clause?

PARTIES TO THE PROCEEDINGS

The Petitioners are identified in the Petition.

The Respondent is Pacific Merchant Shipping Association, a membership corporation.

The Association's members are American President Lines, Ltd.; American Waterways Operators; ARCO Marine, Inc.; Australia-New Zealand Direct Line; Bay and Delta Towing Ltd.; Blue Star (North America) Ltd.; Chevron Shipping Co.; Columbus Line; Crowley Maritime Corp.; d'Amico Line; DSR-Senator Line Inc.; Evergreen America Corp.; Foss Maritime; General Steamship Corp.; Grancolombiana; Hanjin Shipping; Hapag-Lloyd (America) Inc.; Hyundai Merchant Marine; Inchcape Shipping Services; Italia Line; "K" Line America, Inc.; Maersk Inc.; Transportacion Maritima Mexicana; Mitsui OSK Lines (America), Inc.; Nedlloyd Lines; Neptune Orient Lines; Norsk Pacific Steamship Co.; Nippon Yusen Kaisha Line; Orient Overseas Container Line (USA) Inc.; Polynesia Line; Princess Cruises; Seaboard Shipping Co.; Sea-Land Service, Inc.; Shinwa Line; Showa Line; Steamship Association of Southern California; Star Shipping; Toko Line; USS-Posco Industries; Yang Ming Line.

TABLE OF CONTENTS

	Page
Counterstatement of Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Counterstatement of the Case	1
Reasons for Denying the Writ	11
I. The Petition Sets Forth No Grounds Even Approaching The "Unmistakably Clear" Standard That Is Requisite To Show Congressional Approval Of State Discrimination	11
II. Section 5353(b) Is Patently Discriminatory And Necessarily Invalid Under All Of This Court's Decisions.	16
III. Discrimination Against Foreign Commerce Is Not Excused Because California Based Carriers Competing In Foreign Commerce Would Pay The Same Fees.	21
IV. Requiring State Fees To Be Non-Discriminatory Casts No "Cloud Over Future Federal-State Cooperation".	25
Conclusion	26

Contents

Page

TABLE OF CITATIONS

Cases Cited:

American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) 21

Associated Industries of Missouri v. Lohman, 511 U.S. __, 114 S. Ct. 1815 (1994) 13, 18

Bacchus Imports Ltd. v. Diaz, 468 U.S. 263 (1984) 19

Barclay's Bank, PLC v. Franchise Tax Bd., 512 U.S. __, 114 S. Ct. 2268 (1994) 12, 13, 14, 15

Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992) 18, 22, 23

Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983) 15

Cranberry Hill Corp. v. Shaffer, 629 F. Supp. 628 (N.D.N.Y. 1986) 20

Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) 21

Hughes v. Oklahoma, 441 U.S. 322 (1979) 17

Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71 (1992) ..12, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25

Contents

	Page
Maine v. Taylor, 477 U.S. 31 (1986)	12, 13
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940)	12
McLean & Co. v. Denver & Rio Grande R.R., 203 U.S. 38 (1906)	21
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	14
National Solid Waste Management, Inc. v. Voinovich, 959 F.2d 590 (6th Cir. 1992)	20
New Energy Co. v. Limbach, 486 U.S. 269 (1988)	18
New York v. Compagnie Generale Transatlantique, 107 U.S. (17 Otto.) 59 (1883)	18
Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214 (1995)	12
Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. __, 114 S. Ct. 1345 (1994)	12, 16, 20, 21, 22, 23, 24
Pure Oil Co. v. State of Minnesota, 248 U.S. 158 (1918)	21
State Farm Mut. Automobile Ins. Co. v. Duel, 324 U.S. 154 (1945)	12

Contents

	Page
Trailor Marine Transport Corp. v. Vasquez, 977 F.2d 1 (1st Cir. 1992)	19, 20
Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1 (1986)	14
Statutes Cited:	
7 U.S.C. § 150bb	9
7 U.S.C. § 150ff	9
7 U.S.C. § 160	3, 9
7 U.S.C. § 161	3, 9, 26
21 U.S.C. § 136a	9, 11, 15
46 U.S.C. § 883	8, 24
46 U.S.C. § 883.1	8, 24
49 U.S.C. § 40,102	8
49 U.S.C. § 41,102-41,108	8
California Food & Agricultural Code:	
§ 403	2, 4
§ 407-408	2, 4

Contents

Page

§ 434 ..... 2, 4

§ 5023-30 ..... 2, 4

§ 5301-5322 ..... 2, 4

§ 5341 ..... 2, 4

§ 5341.5 ..... 2, 4, 7, 10

§ 5350 ..... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10

§ 5352 1

§ 5353 ..... 1, 2, 4, 5, 6, 7, 10, 11, 16, 21, 22, 23

§ 5401-6968 4

§ 16,001-16,006 4

United States Constitution Cited:

Article I, § 8, cl. 3 10

Other Authorities Cited:

3 Cal. Code of Adm. Regs.:

§§ 3250-3429 3

§ 3250 4

Contents

	Page
§ 3252	4
§ 3256	4
§ 3258	4
§ 3406	4
§ 3412	4
§ 3414	4
§ 3417	4
§ 3422	4
§ 3423	4
§ 3425	4
§ 3560	1
7 C.F.R. Parts 301, 318	3
7 C.F.R. § 301.64-3	4
7 C.F.R. § 301.6-10	4
7 C.F.R. § 318.13(a)	4
7 C.F.R. § 318.58	4
7 C.F.R. §§ 319.8-321.1	4

STATEMENT OF JURISDICTION

Respondent adopts the Petition's Statement of Jurisdiction.

COUNTERSTATEMENT OF THE CASE

1. California Food & Agricultural Code § 5350, enacted in 1990, imposes plant pest inspection fees on operators of vessels and aircraft entering California in foreign commerce. Section 5353 explicitly uses both a carrier's engagement in foreign commerce and a voyage or flight occurring in foreign commerce as statutory determinants for imposing the fees. Section 5353(b), in issue here, provides:

> Each commercial marine carrier *engaged in foreign commerce* which carries ... materials which are, or are likely to be, infested with any pest shall pay a fee of two hundred dollars ($200) to the director upon the arrival in this state of the carrier *on a voyage which originated outside the United States* from a country identified and listed by the director .... Cal. Food & Agr. Code § 5353(b)(emphasis supplied); *see* 3 Cal. Code of Adm. Regs. § 3560.[1]

---

1. Although California Food & Agricultural Code § 5352 characterizes the fees as facility user fees, Petitioners refer to them as "inspection fees" and do not defend or describe them as user fees. *See* Petition, 7, 24. There were and are no State inspection facilities at marine terminals (which are privately operated by ocean carrier affiliates or their contractors). *See* App. 4. The Petition's statement at page 7 that the State set up and staffed some of its own inspection stations at marine terminals and airports is contradicted by the record reference cited. *See* App. 126-27 ¶ 7. Section 5353(b) inspection fees may be increased up to $600 per call or decreased by administrative action to

(Cont'd)

The Code has long subjected all vessels, aircraft, trucks and trains to both State and county inspections in all types of commerce but solely at taxpayer expense until fees were imposed by section 5353 in foreign commerce alone. *See* Cal. Food & Agr. Code §§ 403, 407-8, 434, 5023-30, 5301-5322, 5341, 5341.5; App. 22-23. Section 5350, which was part of the same legislation that adopted section 5353, provides for marine/airport inspections and related activity and applies to incoming foreign and domestic interstate commerce. The only new feature of the 1990 legislation was section 5353's inspection fees in foreign commerce, since the regulatory authority set forth in section 5350 already existed in the sections cited.

The Petition's Statement of the Case and related argument emphasize that section 5353(e) requires that the fees be used for the purposes of sections 5350 and 5353, implying that fees collected in foreign commerce are limited by law to paying expenses in foreign commerce. *See* Petition, 6, 23. However, section 5350's provisions are not limited to foreign commerce and plainly also encompass both domestic offshore commerce and commerce from the contiguous states which are subject to numerous domestic plant pest quarantines.[2] *See* 7 C.F.R. Parts 301,

---

(Cont'd)
reflect changes in costs that are not limited either to inspection costs or to costs in foreign commerce. Section 5353 does not require that any inspection actually be performed for fees to apply, and there are no requirements that all vessels or aircraft be inspected.

2. Section 5350(a) provides for inspections of "conveyances entering California through airport and maritime facilities" which encompasses arrivals in domestic interstate commerce. Section 5350(b) and (e) integrate section 5350 with the inspection structure long applicable in domestic commerce by requiring the Director to maintain marine terminal and airport inspection facilities "pursuant to Section 5341" and to utilize State inspectors and other State officials to carry out section 5350. Section 5341, in turn,
(Cont'd)

318; 3 Cal. Code of Adm. Regs. §§ 3250-3285. Fees that are collected only in foreign commerce, accordingly, are not limited by section 5353(e) to payment of expenses incurred solely in foreign commerce.

Section 5350's regulatory provisions are integrated with other sections of the Code applicable to domestic commerce of all types and requiring carriers of all kinds to submit to inspection. These sections not only authorize Petitioners to perform inspections, they also require carriers and others to submit to them on pain of penalty and authorize Petitioners to seize contaminated products, promulgate quarantines,[3] impose sanctions

---

(Cont'd)
authorizes inspection stations anywhere "within" California to prevent either the "introduction into, or the spread within this state, of pests. . . ." Section 5350(c) requires a public information program and does not limit the program to foreign commerce. Section 5350(d), which provides for exemptions from California inspections if other states or federal agencies agree to inspect outside California, necessarily applies exclusively in commerce from domestic origin points where these other state or federal agencies have jurisdiction and personnel. Providing an exemption procedure applicable in domestic commerce underscores that the basic regulatory provisions in section 5350(a), for which a potential exemption is provided by subsection (d), apply and were intended by the Legislature to apply to domestic interstate commerce.

3. The cited inspection provisions enforce longstanding California interior quarantine measures, adopted to interdict the intrastate movement of plant pests and pest-bearing products, extensive federal and supplementary State quarantines in domestic interstate commerce promulgated under 7 U.S.C. § 161 and federal quarantines in foreign commerce authorized by 7 U.S.C. § 160. *See* 7 C.F.R. Parts 301, 318-20; 3 Cal. Code of Adm. Regs. §§ 3250-3429. The Petition is incorrect in stating that pests or products quarantined in foreign commerce are not found in or subject to quarantines in domestic commerce. *See* Petition, 3, 10. For example, numerous pests including medfly and various other destructive fruit flies are subject to interstate and to California intrastate quarantines as well as to quarantines in

(Cont'd)

and conduct public information programs. *See* Cal. Food & Agr. Code §§ 403, 407-8, 434, 5023-30, 5301-5322, 5341, 5341.5, 5401-6968, 16,001-16,006. Since section 5350 itself does not provide the full range of statutory powers necessary for Petitioners to enforce its inspection provisions, it depends on other sections of the Code which do.

Notwithstanding regulatory provisions that are both facially applicable and are applied to commerce of all types and to transport instruments of all types,[4] no provision of the Code imposes fees on any class of carrier or transport conveyance operating in domestic intrastate or interstate commerce, whether to recover costs of State or county inspection or information programs, general administrative overhead costs or miscellaneous program costs. Revenues from foreign commerce inspection fees imposed under section 5353, however, were expended for each of those purposes. *See* Petition, 8.

2. In addition to the Code's inconsistent approach to financing Petitioners' costs in foreign and domestic commerce,

---

(Cont'd)
foreign commerce. *Compare, e.g.*, 7 C.F.R. §§ 301.64-3 - 301.64-10, 318.58; 3 Cal. Code of Adm. Regs. §§ 3250, 3252, 3256, 3258, 3406, 3412, 3414, 3417, 3422-23, 3425 *with* 7 C.F.R. §§ 319.8 - 321.1 The Petition further incorrectly implies that California's 1989 "medfly" infestation and the costly eradication thereof entered California in foreign commerce and that foreign commerce poses a unique type of threat to a highly valuable industry. *See* Petition 5. Neither the record in this case nor the public record reveals whether the 1989 medfly outbreak referenced in the Petition entered California in foreign commerce or from a domestic origin like Hawaii, which is subject to domestic medfly quarantine. *See* 7 C.F.R. § 318.13(a).

4. Such inspection authority is in fact applied to carriers of all types in both intrastate and interstate commerce. *See* Testimony of Martina Haleamau, Chief, Pest Exclusion Branch, California Department of Agriculture, Clerk's Transcript on Appeal 956-60, 964-65, 2152, 2559-60.

data of record supplied by Petitioners showed that foreign commerce fees more than paid for all variable costs of Petitioners' activities in foreign commerce subject to section 5350. Over 15 percent of total section 5353 fee revenues were used to contribute to general State and Departmental overhead costs. *See* App. 134, ¶ 10; Petition, 8. Since in domestic commerce no carriers paid fees contributing to general overhead costs the use of fee revenues from foreign commerce for general overhead necessarily had the effect of a subsidy of domestic commerce.

Petitioners' data of record further showed that costs of performing State and county inspections of transportation operations in domestic intrastate and interstate commerce were substantial and greatly exceeded both counterpart inspection costs and total costs in foreign commerce. As of Petitioners' fiscal year 1990-91, total expenses for all State inspections, exclusive of costs of vessel/aircraft inspections under section 5350, were about $9.9 million per annum, and costs of Petitioners' Pest Exclusion Branch were $10.8 million, exclusive of section 5350 costs.[5] California county costs of inspecting at "air, rail, trucking, parcel post and postal terminals" added another $9.8 million. See n.5, *supra*. Combined State/county costs of performing inspections, accordingly, were $19.7 million per annum, not including costs

---

5. "[I]nspection activities, other than airport and maritime inspections, are performed by CDFA personnel at a cost of $9.92 million in the last fiscal year. County agricultural personnel also perform inspections at air, rail, trucking, parcel post and postal terminals. The cost of these activities was $9,800,036 in the last fiscal year." "[T]he total cost for operating the Pest Exclusion Branch during fiscal year 1990-91 was $10,800,647." Defendants' Response to First Set of Interrogatories, Exh. A-2 to Declaration in Support of Motion for Summary Judgment, Clerk's Transcript on Appeal, 917, 921. Related costs incurred in connection with performance of county inspections are not of record.

of vessel/aircraft inspections subject to section 5350 and were $22.1 million per annum if section 5350 inspection costs of $2.4 million per annum are included.[6] *See* App. 8 and n.5, *supra*.

For efficiency reasons, Petitioners elected to contract out the performance of marine and air inspections in foreign commerce subject to section 5350 to the United States Department of Agriculture which was already inspecting the same vessels and aircraft. *See* App. 4-7. 53 additional inspectors were employed of which 7 (13 percent) were assigned to maritime. App. 132, ¶ 5. The $2.4 million annual cost to Petitioners of section 5350 contract inspections in foreign commerce, including federal overhead, constituted about 10.9 percent of total State/county inspection costs of about $22.1 million per annum.

Maritime fee revenues were particularly high as compared to maritime inspection costs and in proportion to all related costs because both inspections and Petitioners' information program under section 5350 focused primarily on passenger traffic and hence on airports to which 46 (87 percent) of the 53 inspectors financed from revenues generated by section 5353 were assigned. *See* App. 132 ¶ 5; Testimony of Islam Siddiqui, Clerk's Transcript on Appeal 993. Petitioners' maritime inspection costs in foreign commerce were $312,000 per annum (.13 x $2,400,000) or 1.4 percent of the $22.1 million in total annual

---

6. Data supplied by Petitioners below do not permit a complete and accurate comparison using full program costs because only costs of performing inspections were of record in the case of counties, and it is not clear that the $10.8 million annual cost of operating Petitioners' Pest Exclusion Branch included any allocation of State and Departmental general overhead or information program costs. However, those State/county costs identified in the record as related to inspections were at least $25.9 million per annum ($10.8 million for the Branch, $9.8+ million for counties and $4.3 million for all section 5350 costs).

State/county inspection costs. Annual maritime fees in foreign commerce produced revenues of $882,000 per annum which were 21 percent of total State revenues ($4.3 million) from all carrier inspection fees and were collected entirely in foreign commerce. These maritime inspection fee revenues were about 2.5 times Petitioners' $312,000 in annual maritime inspection costs. *See* App. 133; Petition, 8.[7]

As of January 1, 1995, Petitioners elected to terminate contract inspections in foreign commerce conducted under section 5350 and end Petitioners' associated $2.4 million in annual contract inspection costs. Petitioners' notice thereof stated that such inspections were no longer necessary. Petitioners, however, retained section 5353 inspection fees but set them at 50 percent of their prior level.[8]

Unlike inspections in foreign commerce, which are discretionary and hence involve significant variations in regulatory costs if staffing levels or the frequency of inspections is changed, California Food & Agricultural Code section 5341.5 requires that, with very limited exceptions, "every" truck

---

7. If total section 5350 costs are allocated between air and maritime commerce based on the ratio of maritime to air inspection costs annual maritime fees ($882,000) were about 85% higher than all maritime costs ($559,000).

8. The January 1, 1995 action and the reasons for it were set forth in an official Departmental rule change announcement of which the California Supreme Court took judicial notice. *See* App. 7-8. Since the section 5350 contract inspection costs eliminated had been 55 percent of total costs paid from section 5353 revenues received in foreign commerce the effect of the 50 percent fee reduction, coupled with elimination of the inspection costs, was to increase funds available for other purposes by about $215,000 per annum and, of course, it enormously increased the proportion of inspection fee revenues available for purposes other than performing foreign commerce inspections.

entering California with agricultural products in domestic commerce (*see* App. 5, n.2) must be inspected and issued a certificate of passing inspection. Such non-discretionary inspections of necessity result in substantial built-in regulatory costs which increase with the growth of commerce and with inflation. Truck border inspections in domestic commerce, performed by 126 State inspectors at State quarantine inspection facilities, cost Petitioners approximately $8.4 million per annum as of 1991-2. *See* Petition, 11; App. 5, 9. That cost alone was 3.5 times the $2.4 million per annum cost of section 5350 foreign commerce inspections of maritime and air carriers combined, and it was 27 times the $312,000 annual cost of the maritime inspections.[9]

3. Participation in domestic interstate or intrastate ocean and air commerce is limited by law to United States citizens. Particularly stringent statutes limit participation in domestic waterborne commerce to vessels built in the United States that are owned and crewed by United States citizens. *See* 46 U.S.C. §§ 883, 883.1;. Domestic air commerce is restricted with very limited exceptions to United States citizens and to U.S. registered aircraft. *See* 49 U.S.C. §§ 40,102, 41,102-41,108. In consequence, California law provides for inspections without fee of carriers operating in domestic intrastate and interstate commerce to and between California ports and points which is limited by law to U.S. citizens and transport instruments. California based carriers such as Matson Navigation Co. are a subset of that class. By contrast, foreign commerce to California ports made subject to the fees is not limited to U.S. citizens or to U.S. vessels and overwhelmingly moves in foreign vessels. *See* United States Department of Transportation, Maritime

---

9. Petitioners' truck inspection cost per inspector in domestic commerce ($67,000 per inspector) (*see* App. 5, 9) was about 50% higher than the $44,500 cost for each of the 53 contract inspectors in foreign commerce who carried out section 5350 prior to Jan. 1, 1995. *See* App. 4, 8.

Administration, United States Oceanborne Foreign Trade Routes, (Oct. 1992) 70-103.

4. Neither a federal statute providing for federal inspection fees nor its legislative history adverts to state agricultural inspection fees. *See* 21 U.S.C. at 136a. Neither the Petition nor the record herein indicate that either discriminatory or non-discriminatory state inspection fees were ever brought to the attention of Congress.[10]

5. The Petition's Statement of the Case inaccurately characterizes Petitioners' decision to contract with a federal agency to perform the inspection functions authorized in section 5350 as merely a "transfer of inspection fees from the State to USDA . . . formalized in" the contract between them. *See* Petition, 7. California incurred and paid for contract services rendered only so long as the contract continued. The fees were not treated by the California Legislature or by Petitioners' contract with the United States Department of Agriculture as a kind of State tax dedicated in part to support a federal function. The contract, set forth in the Appendix to the Petition, makes no reference to California's fees and hence makes no reference to any transfer of all or part of them to USDA or to any USDA entitlement to them, either temporarily, permanently or in any particular part. *See* App. 106-119.

6. Respondent Pacific Merchant Shipping Association

---

10. Federal law authorizes state pest quarantines and quarantine enforcement measures but expressly limits them to domestic interstate commerce, to circumstances in which no federal quarantine is in place and to quarantine enforcement that is non-discriminatory. *See* 7 U.S.C. § 161 (second and fourth provisos). Federal law conferring federal authority in foreign commerce makes no reference to authorizing state quarantines, to their enforcement or to fees. *See* 7 U.S.C. § 160 and supplementary sections 150bb and 150ff.

("PMSA") challenged California Food & Agricultural Code § 5353(b) in state court as facially discriminatory, as discriminatory in application based on regulatory costs supplied by Petitioners, and as violative of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. Contrary to the assumption in the Petition's Statement of the Case and to related statements at pages 14, 16, 25-28 of the Petition, neither PMSA's facial challenge nor its related challenge using regulatory cost data was limited to comparing inspections of interstate trucks, which are subject to mandatory inspections at taxpayer expense under section 5341.5 of the Code, with inspections of vessels in foreign commerce, which are subject to regulatory fees under section 5353 whether or not inspected. Rather, Respondent challenged section 5350's use of transport moves and business transactions in foreign commerce as statutory determinants for imposing fees when the Code provides for — and Petitioners and California counties perform — inspections of every type of carrier operating in domestic intrastate and interstate commerce solely at taxpayer expense. *See* App. 36 and n.15 *infra*.

7. The trial court held the fees to be facially discriminatory by summary adjudication but gave Petitioners a second opportunity to articulate some constitutionally adequate justification that was relevant to the fee discrimination in issue. When no such justification was provided, the court invalidated the fees as violative of the Commerce Clause. *See* App. 2, 41.

The Court of Appeal reversed. Although that court observed that the fees would be discriminatory and "inevitably stricken down" under this Court's "waste disposal fee cases" if foreign and domestic commerce inspections had been kept within a single inspection program, the court held that Petitioners' action in contracting out inspections in foreign commerce resulted in a separate regulatory program which in turn made facial discrimination analysis and summary disposition of the

discrimination issue inappropriate under California summary adjudication practice. *See* App. 58-61.

The California Supreme Court reversed. It unanimously held section 5353(b) fees facially discriminatory under this Court's decisions. It stressed that the discrimination was more patent, extreme and unjustifiable than in cases of fees and tax invalidated by this Court. It rejected Petitioners' justifications as logically unrelated to the total discrimination in question and as constitutionally inadequate. *See* App. 19-23, 24-28, 30-41.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SETS FORTH NO GROUNDS EVEN APPROACHING THE "UNMISTAKABLY CLEAR" STANDARD THAT IS REQUISITE TO SHOW CONGRESSIONAL APPROVAL OF STATE DISCRIMINATION.

The Petition's principal claim, which was neither presented to nor passed upon by any of the state courts below (*see* App. 1-65), is that the state courts erred even in treating this case as a dormant Commerce Clause case. Petitioners assert that because Congress authorized federal vessel inspection fees limited to foreign commerce in 21 U.S.C. § 136a Congress set a federal example and further that this example should be construed as implied Congressional authorization of state fees that discriminate against foreign commerce. *See* Petition, 14-15, 17-22.

Because Petitioners did not make this constitutional claim below and instead argued only that the statute was consistent with this Court's dormant Commerce Clause standards, the new

claim is not properly before this Court and constitutes no basis for granting the writ. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2219 (1995); *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160-61 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940).

As the Petition acknowledges, *Maine v. Taylor* and other cases have required that "congressional direction" to exempt state discrimination from Commerce Clause constraints must be shown to be "unmistakably clear." *Maine v. Taylor*, 477 U.S. 31, 39 (1986); *see* Petition, 20. Absent such a showing, fees like those in this case are plainly invalid under all this Court's decisions. *E.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. __, 114 S. Ct. 1345, 1353, 1354 (1994); *Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 78-79, 82 (1992).

The Petition does not purport to satisfy *Maine*'s "unmistakably clear" standard for showing that Congress actually addressed and approved of state discrimination. Indeed Petitioners acknowledge that they must avoid application of the *Maine* standard. *See* Petition, 20. The Petition argues that the *Maine* standard, as applied to discrimination challenges, has been supplanted at least as to foreign commerce where Petitioners would apply a more relaxed implied consent standard. *See Barclay's Bank, PLC v. Franchise Tax Bd.*, 512 U.S. __, 114 S. Ct. 2268 (1994); Petition, 20, *see also* Petition, 14-15, 17-22. Petitioners assert that in this case Congress impliedly authorized state inspection "fee discrimination" (Petition, 17) without any showing that Congress adverted to or knew thereof, a position that goes well beyond the relaxed standard invoked and that *Barclay's* in any event carefully limited to a non-discrimination based challenge. *See* Petition, 14-15, 17-22.

Since *Barclay's* is the only case said by Petitioners to modify *Maine's* "unmistakably clear" standard as applied to discrimination challenges, *Barclay's* rejection of that linchpin assertion is necessarily fatal to Petitioners' request that the writ be granted based on the Petition's principal claim. *See* Petition, 20. *Barclay's* used standard dormant Commerce Clause discrimination analysis to address and to dispose of the discrimination claim in foreign commerce raised in that case. It did not apply the relaxed tacit congressional assent standard that Petitioners urge here. *See* 114 S. Ct. at 2276-77. Having found the tax non-discriminatory under normal dormant Commerce Clause standards, *Barclay's* addressed a further claim that even if non-discriminatory the tax was invalid because federal uniformity was required in foreign commerce. In rejecting the federal uniformity claim the Court found that Congress, by a long course of conduct in considering recommendations to ban such taxes but refraining from doing so, had demonstrated its consent.

Contrary to the Petition, *Barclay's* confirmed that, in context of *discrimination* challenges, a claim that Congress approved state discrimination must be shown with the "unmistakable" clarity required in *Maine*. Instead of displacing the *Maine* standard, as the Petition claims, *Barclay's* confirmed it in discrimination cases as follows:

> An important premise underlying both decisions [*Wardair* and *Container Corp.*] was this: Congress may more passively indicate that certain state practices do not "impair federal uniformity in an area where federal uniformity is essential" . . . [citation omitted]; it need not convey its intent with *the unmistakable clarity required to permit state regulation that discriminates against*

> *interstate commerce* or otherwise falls short under *Complete Auto* inspection. [citing *Maine v. Taylor*] 114 S. Ct. at 2282-83 (emphasis supplied).[11]

Further:

> Absent congressional approval . . . a state tax . . . will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax . . . discriminates against interstate commerce . . ." 114 S. Ct. at 2276 (emphasis supplied).

Even if a discrimination challenge could be defeated by satisfying the more relaxed standard for congressional consent applicable to federal uniformity challenges in foreign commerce the Petition does not approach satisfying that standard.

---

11. The other cases cited by the Petition either involved no claim of discrimination or, as in *Barclay's*, a conclusion by this Court that no discrimination existed. *See Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 15 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 157 (1982). Further, these cases involved treaties or federal statutes that addressed the state or tribal taxes in question and imposed federal statutory or treaty standards and procedures for calling the balls and strikes to determine whether a particular tax would be permissible or prohibited. These federal uniformity cases, even if applied to discrimination challenges, would not remotely support a claim that a federal statute that does not even refer to state fees, still less authorize discriminatory state fees, somehow creates an exception to Commerce Clause anti-discrimination standards. To the contrary, *Wardair* makes clear that the standard for setting aside dormant Commerce Clause criteria based on congressional consent even in a non-discrimination context is that "the Federal Government has *affirmatively decided to permit* the States to impose these . . . taxes. . . ." (477 U.S. at 12) and has itself thereby "*struck the balance*. . . ." *Merrion*, 455 U.S. at 153. (Emphasis supplied). No claim that remotely approaches that standard appears in the Petition.

Barclay's found multiple "indicia of Congress's willingness to tolerate" nondiscriminatory unitary taxes imposed on the worldwide income of multinational corporations because, inter alia, Congress for two decades had "focused its attention on this issue" (114 S. Ct. 2285) and had repeatedly addressed and considered legislative proposals to prohibit or modify such taxes but did not enact them even though a decision of this Court had "left the ball in Congress' court. . . ." *Id.* at 2283; *see Container Corp of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

The Petition makes no claim that Congress even knew of the existence of state inspection fees of any kind, still less that it adverted to state fees imposed in a discriminatory manner, or in any way indicated its approval thereof.[12] The writ should not be granted where the Petition fails to show that the new standard the Petition urges is not met in the case before the Court.

The Petition's assertion that a federal fee imposed in foreign commerce sets an example that thereby serves as congressional approval of otherwise unconstitutional state discrimination lacks any support. This Court rejected a similar suggestion in *Kraft*. *See* 505 U.S. at 81-82. There Iowa asserted unsuccessfully that the distinction it had drawn between taxing income of Iowa taxpayers flowing from foreign subsidiaries but not income from subsidiaries in other states was non-discriminatory or was justified because, for administrative convenience, Iowa had merely followed the federal example of the Internal Revenue

---

12. Even assuming that it were rational to urge that Congress had approved discriminatory state fees, otherwise precluded by the Commerce Clause, merely by authorizing a federal fee, section 136a would still fall short as the example postulated. The federal inspection fees authorized are restricted to recovering federal "costs of agricultural quarantine and inspection services". The California fees are not restricted to such costs and are collected for an expanding variety of purposes that no longer include regular inspections. *See* 21 U.S.C. § 136a(a)(1)(D); App. 7.

Code and federal regulations. Notwithstanding that federal example, the Court invalidated Iowa's tax for drawing a geographic distinction based on whether subsidiaries and their income were foreign or domestic. 505 U.S. at 81-82.

Congress, of course, is not subject to anti-discrimination proscriptions imposed on states by the Commerce Clause. Since Congress is free to discriminate but states with few exceptions are not it would be irrational to infer congressional approval of state discrimination from a mere federal example as the Petition urges. No case cited by the Petition purports to do so, and *Kraft* rejects the claim.

II.

SECTION 5353(b) IS PATENTLY DISCRIMINATORY AND NECESSARILY INVALID UNDER ALL OF THIS COURT'S DECISIONS.

The dormant Commerce Clause issues in this case do not involve any conflict between decisions of this Court or between decisions of lower courts. Although this case is of great interest to the parties it presents no unresolved or important Commerce Clause questions. It is noteworthy only because it is difficult to find cases in the reports in which the discrimination is so overt, is at such an extreme and is so bereft of credible or even relevant justification.

Oregon Waste and similar cases required the California Supreme Court to hold California Food & Agricultural Code §5353(b) facially discriminatory because it so patently makes foreign commerce a "statutory determinant" for imposing regulatory fees in foreign commerce alone. *See Oregon Waste*, 114 S. Ct. at 1350. As *Kraft* put it in addressing a state's "preference for domestic commerce over foreign commerce" or

of "business activity in the United States" over activity elsewhere, such a "statute cannot withstand . . . scrutiny, for it facially discriminates against foreign commerce and therefore violates the Foreign Commerce Clause." 505 U.S. at 78-79, 82. These decisions make this an ipso facto case.

Moreover, the discrimination in this case is at an extreme. Ocean and air carriers in foreign commerce pay what the Petition concedes are "inspection fees" that substantially exceed costs of inspections whereas in all forms of domestic commerce carriers are inspected at substantial cost, yet they pay no fees for inspection, for related regulatory costs or for general overhead.[13] *See* Petition, 7, 8, 24. As this Court said in *Hughes v. Oklahoma*, 441 U.S. 322, 337-88 (1979):

> Far from choosing the least discriminatory alternative . . . [the State has made] a choice of the most discriminatory means, even though nondiscriminatory alternatives would seem likely to fulfill the State's purported local purpose most effectively.

This Court's rulings regularly invalidate state fees and taxes in context of far more subtle discriminations justified by far more compelling public policy considerations than the naked,

---

13. The Petition asserts that charging fees for domestic commerce inspections, following which individual certificates of inspection are issued to drivers, "could" cause administrative problems although why this is so remains unstated. *See* Petition, 26. Petitioners represented to the trial court and to the California Court of Appeal, without reference to any administrative difficulties anticipated, that fees for such domestic inspections were "indeed — under consideration". *See* State Defendants' Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment, Nov. 23, 1992, pp. 10, n.6, Clerk's Transcript on Appeal 2248; Opening Brief for Appellants, California Court of Appeal, p. 5.

extreme and readily avoidable discrimination in this case. *See Kraft*, 505 U.S. at 75-81; *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 337, 342-43 (1992); *New Energy Co. v. Limbach*, 486 U.S. 269, 273-4, 279 (1988).[14] Moreover, the California statute facially discriminates in favor of intrastate California commerce and carriers, and the prohibited discrimination is effected by California counties as well as by the State in inspecting carriers in domestic commerce for free. *See Associated Industries of Missouri v. Lohman*, 511 U.S. __, 114 S. Ct. 1815, 1822 (1994).

The Petition reflects throughout a false assumption which, although irrelevant under this Court's Commerce Clause decisions, should be corrected. *See* Petition 14, 16, 25-28. Respondent's position was at no time limited to a comparison of treatment of trucks in domestic interstate commerce vis-a-vis the treatment of vessels in foreign commerce. *See* App. 17. Rather, it stressed that every type of carrier and class of commerce was subject to inspections creating regulatory costs but that only carriers in foreign commerce paid fees.[15] The Petition confuses

---

14. The payment by Petitioners to the USDA for contract inspections does not serve to validate discriminatory fees simply because part of the revenues therefrom was utilized for the contract payments. Even where local quarantine fees were, by the terms of the statute adopting them, to be paid in part to the federal treasury this Court invalidated fees otherwise violative of the Commerce Clause. *New York v. Compagnie Generale Transatlantique*, 107 U.S. (17 Otto.) 59 (1883).

15. We note the California Supreme Court's statement at App. 18 that Respondent did not contend that there was discrimination vis-a-vis *intrastate* commerce, but we respectfully point out that the statement reflects an oversight. *See e.g.*, Opening Brief for Plaintiff and Respondent before the Supreme Court of California p. 18 which summarizes the facial discrimination generically challenged as favoring "domestic commerce". Respondents urged: "A vessel (or aircraft) *does* pay a fee if it arrives from Germany or

(Cont'd)

a dramatic example of discrimination favoring trucks operating in domestic interstate commerce with the broader discrimination favoring all types of transport in domestic commerce presented by the statutory provisions in question and by Respondent's constitutional challenge.

In addressing the example of costly border inspections of trucks performed solely at taxpayer expense in domestic commerce the California Supreme Court emphasized that the thing to be compared was inspections and related regulatory services performed in each case and associated costs. It correctly rejected Petitioners' position that, in context of fees imposed on foreign commerce alone, physical differences in the transport conveyances inspected or pests sought were relevant to determining discrimination.[16] *See* App. 30-32; Petition, 25-29.

(Cont'd)
Australia but *does not* pay a fee if it arrives from Hawaii, Florida, Puerto Rico or Guam or from *other California ports or points*, even though those places are subject to numerous domestic quarantines." (emphasis supplied); *See* Respondent's Brief, California Court of Appeal, 2, 3, 4, 13, 17. Respondent at every stage of this case urged discrimination vis-a-vis "agricultural inspections performed under the same Article of the Code of trucks, vessels and other transportation instruments potentially carrying plant pests in domestic interstate or in domestic intrastate commerce." Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Clerk's Transcript on Appeal, 1007; *See id.*, 1009, 1012, 1015, 1017-18.

16. This Court invalidated a state tax exemption for wines made from local pineapple juice when the exemption was not granted to malt or grape based beverages mainly produced outside the state. *Bacchus Imports Ltd. v. Diaz*, 468 U.S. 263 (1984). The discrimination was not excused because the products differed or were made from different plant species. Higher effective regulatory fees imposed on marine cargo vans than on local trailers have been invalidated as discriminatory. *Trailor Marine Transport Corp. v. Vasquez*, 977
(Cont'd)

Further, claims of differences in inspection costs per unit inspected would be relevant under *Oregon Waste* and *Kraft* only to justification of discrimination and only then if different levels of fees had been imposed. If higher fees in foreign commerce are shown to reflect bona fide regulatory cost differences stemming from differences in conveyances inspected, in the pests sought or in time or cost per unit inspected, differences between vessel, aircraft and truck inspections generally asserted by Petitioners might at least be relevant as background to showing a cost justification for differences in fee amounts, but that is not this case. *See* App. 31-32; *accord, National Solid Waste Management, Inc. v. Voinovich*, 959 F.2d 590, 593-94 (6th Cir. 1992).[17] They have no relevance in this case because fees were imposed in foreign commerce alone, and Petitioners made no attempt to claim or show that costs in domestic commerce were nil or negligible.[18] *See* App. 30-32.

Finally, the unreasonable "user fee" and the older "undue burden on commerce" fee cases cited at page 27 of the Petition,

---

(Cont'd)

F.2d 1 (1st Cir. 1992). Although lands are always unique higher fees for registering sales of subdivision lots in other states than for selling in-state lands have been held facially invalid. *Cranberry Hill Corp. v. Shaffer*, 629 F. Supp. 628 (N.D.N.Y. 1986).

17. It was in context of cases in which different levels of regulatory fees were challenged that this Court left open the door to allocation of regulatory costs in a manner proportional to the generation of such costs. *See Oregon Waste*, 114 S. Ct. at 1351.

18. The Petition at page 11 shows that bare inspection costs for an average truck was $30 which approaches the $43 fee per aircraft arriving in foreign commerce after January 1, 1995 even though Petitioners' inspection costs of arriving aircraft in foreign commerce are de minimis after that date. *See* App. 6, n.4.

apparently as an oblique if antique challenge to the *Oregon Waste* and *Kraft* tests, are not relevant to fee or tax discrimination challenges. None of them involved state regulatory activity and costs in all classes of commerce coupled with fees imposed only on a class of commerce protected by the Commerce Clause. *See Pure Oil Co. v. State of Minnesota,* 248 U.S. 158 (1918); *McLean & Co. v. Denver & Rio Grande R.R.*, 203 U.S. 38 (1906). Rather, they presented claims that fees were excessive and, in the older cases cited, constituted a tax exacted on interstate commerce at a time when state taxes making interstate commerce pay a fair tax share were nonetheless invalidated as burdens on commerce. As this Court made clear in *American Trucking Ass'ns v. Scheiner,* 483 U.S. 266, 290 (1987) the airport "user fees" upheld in *Evansville* and relied upon by Petitioners were only upheld because they applied to all classes of commerce and were "neither discriminatory nor excessive." *See Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). In any event Petitioners do not claim that the fees here are user fees.

III.

DISCRIMINATION AGAINST FOREIGN COMMERCE IS NOT EXCUSED BECAUSE CALIFORNIA BASED CARRIERS COMPETING IN FOREIGN COMMERCE WOULD PAY THE SAME FEES.

Petitioners assert that although section 5353 imposes fees in foreign commerce alone it lacks "protectionism" as the Petition narrowly defines that term and hence is not discriminatory. Petitioners narrowly define "protectionism" in context of this case as involving both a motive to benefit local businesses and a direct competitive relationship between local businesses benefited and out-of-state businesses burdened, *i.e.*, as "state *efforts* to economically benefit in-state interests at the expense

of out-of-state *competitors*." Petition, 22, 23-24 (emphasis supplied). Since both California based and other ocean carriers would each pay the same fees under section 5353 when competing with each other in foreign commerce, Petitioners urge simplistically that there is no "protectionism" and no discrimination even though the fees are triggered only in consequence of conducting business in foreign commerce. *Id.*

The Petition's "no protectionism/no discrimination" claim is directly at odds with three recent decisions of this Court. It also ignores patent favoritism of domestic commerce to and between California ports that is reserved by law to U.S. carriers and vessels, of which California based carriers and vessels are a predominant subset.

The Petition fails to acknowledge that Kraft holds that a higher tax, triggered by business activities in foreign commerce, is discriminatory and invalid if it facially or otherwise effects a "*preference for domestic commerce over foreign commerce*" or "*favor[s] business activity in the United States generally over business activity abroad*". 505 U.S. at 79 (emphasis supplied). That standard plainly defines discrimination in terms of favoring one class of commerce protected by the Commerce Clause over another class, as the fees in this case patently do. Contrary to the Petition *Kraft* and other cases do not require that a local and out-of-state company each compete in the same class of commerce and be differently burdened because their domicile or principal place of business is outside the state.

Kraft's formulation of discrimination was applied by the Court in context of fee discrimination against domestic interstate commerce in *Oregon Waste* and *Chemical Waste*. In those cases fees were invalidated because they used interstate movements as a "statutory determinant" for imposing higher fees, even though locally domiciled waste disposal facility fee payers competing

with waste disposal facility feepayers domiciled or having their principal place of business out-of-state would each pay the same higher fee for receiving interstate wastes and the same lower fee for receiving domestic origin wastes.[19]

Section 5353 inspection fees, imposed only on foreign commerce and imposed only by reason of business operations conducted and transport moves in foreign commerce, so plainly fall within *Kraft's* basic formulation of discrimination and the similar "statutory determinant" formulation in *Oregon Waste* that Petitioners do not trouble to contest that essential point. That should end the matter and cause the writ to be denied.

Petitioners instead set up and attack a strawman — a corollary point in *Kraft*. The corollary to *Kraft*'s formulation of discrimination is that a tax which is discriminatory because it prefers domestic commerce or business activities over foreign ones does not cease to be discriminatory or avoid invalidation if a state shows that the tax "does not favor local *interests*" or "local commerce" and, indeed, actually "places additional burdens on . . . [in-state] businesses." 505 U.S. at 78-79 (emphasis supplied); *see* Petition, 24. However, that corollary merely applies the basic rule in *Kraft* quoted earlier (and not challenged by Petitioners) in order to reject a particularized state contention.

This case does not even present the "no protectionism" issue that the Petition frames, since both "local interests" and "local commerce" in the form of carriers engaged in domestic commerce are plainly favored. Section 5353 inspection fees also

---

19. *Oregon Waste* captured the essence of *Kraft*'s basic holding in ruling that the constitutional vice of the Oregon fee, triggered by a movement into Oregon in foreign commerce, was that "the statutory determinant for which fee applies to any particular shipment . . . is whether or not the waste was generated out-of-state." 114 S. Ct. at 1347.

plainly favor California based ocean carriers and transport instruments. California based vessels and carriers constitute the predominant subset of domestic commerce to and between California ports in which U.S. carriers and vessels must carry 100% of commerce.[20] *See* 46 U.S.C. §§ 883, 883.1. Oceanborne foreign commerce is subject to no restriction to U.S. carriers or vessels, other than preferences in carrying government cargo, and in foreign trades foreign carriers overwhelmingly predominate.[21]

California here elected to impose fees on the class of commerce overwhelmingly dominated by foreign carriers and in which only one California based ocean carrier plays a part. It imposed no fees in domestic commerce to and between California ports where California based carriers are predominant. Hence, the statute is "protectionist" in the sense used in the Petition as well as the broader sense used in *Kraft* and *Oregon Waste*. It favors locally based businesses and transport conveyances as well as generally favoring "domestic commerce", "local commerce" and "business activity in the

---

20. Four major operators of dry cargo vessels carry virtually all that domestic commerce, and three California headquartered companies (Matson Navigation Co., American President Lines and Crowley Maritime Corp.) collectively are predominant therein. Because of administrative exemptions for tankers only dry cargo vessels are subject to California inspection fees.

21. As of 1990-91, in noncontiguous foreign trades to U.S. west coast ports U.S. carriers had only a 2% share in all trades other than the trade from Asian and Persian Gulf ports. In the trade from Asian and Persian Gulf ports to California ports all U.S. carriers, including American President Lines, the only California based carrier engaged therein, carried only 15 percent of total cargo. U.S. Department of Transportation, Maritime Administration, United States Oceanborne Foreign Trade Routes (October 1992), 65-77.

United States generally over business activity abroad", the very conduct struck down in *Kraft*. *See* 505 U.S. at 78-9.[22]

IV.

REQUIRING STATE FEES TO BE NON-DISCRIMINATORY CASTS NO "CLOUD OVER FUTURE FEDERAL-STATE COOPERATION".

The Petition's "second main reason" why the writ should be granted strains credulity. It asserts that the California Supreme Court's decision, which holds only that if State fees are adopted they must be imposed in a non-discriminatory manner or that, if discriminatory, they must be justified by genuine differences in underlying regulatory costs, somehow "may cast a dormant Commerce Clause cloud over future federal-state cooperation." Petition, 17.

The Petition fails to explain how state-federal cooperation in enforcing pest quarantines could depend on or be adversely affected by a state's inability to impose *discriminatory* state fees without a valid justification. This reason for granting the writ is nothing more than a vague general statement and does not address an issue presented by this case. Moreover, this makeweight policy claim, like Petitioner's principal constitutional claim, was neither presented to nor addressed by the California courts. Finally, federal policy as applied to federal-state cooperation in plant pest quarantine enforcement itself adopts anti-discrimination principles for states. In authorizing state authority to impose and enforce supplementary

---

22. Moreover, the trucking business in domestic intrastate commerce favored by the fee structure almost certainly consists disproportionately of vehicles based and registered in California and operated by small California concerns.

state quarantines, limited to domestic interstate commerce only, Congress required that a state's exercise of such authority be on a non-discriminatory basis. *See* 7 U.S.C. § 161 (fourth proviso).

CONCLUSION

The Petition states no grounds for granting the writ. It identifies no conflict in the case law, no error of law and no reasons of policy that even suggest that this case merits review. The California Supreme Court carefully and correctly applied this Court's precedents, and the writ should be denied.

Respectfully submitted,

R. FREDERIC FISHER
Counsel of Record
DAVID F. SMITH
SHER & BLACKWELL
555 Montgomery Street
Suite 1100
San Francisco, CA 94111
(415) 788-9150

THOMAS G. MINDER
MINDER & MURO
2710 Gateway Oaks Drive
Suite 200, South
Sacramento, CA 95833

Attorneys for Respondent

Dated: April 29, 1996

(3)

No. 95-1568

Supreme Court, U.S.
FILED
MAY 7 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ANN M. VENEMAN, Secretary, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; ISLAM SIDDIQUI, Assistant Director, CALIFORNIA DIVISION OF PLANT INDUSTRY; STATE OF CALIFORNIA, *Petitioners*,

v.

PACIFIC MERCHANT SHIPPING ASSOCIATION, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Daniel E. Lungren
Attorney General of the State of California
Roderick E. Walston
Chief Assistant Attorney General
Charles W. Getz IV
(Counsel of Record)
Assistant Attorney General
Linus Masouredis
Deputy Attorney General
50 Fremont Street, Suite 300
San Francisco, CA 94105-2239
Telephone: (415) 356-6348
Counsel for Petitioners

1400

TABLE OF CONTENTS

Page

I. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND MERIT REVIEW 1

II. RESPONDENT'S CHARACTERIZATION OF THE STATE'S REGULATION IS INACCURATE 5

1. Alleged Intrastate Commerce Discrimination 5

2. Excessive Nature of the Foreign Commerce Fees 7

3. Alleged Subsidization of Domestic Inspection and Other Programs 7

4. Adjusting Foreign Commerce Fees Based on Factors Unrelated to the Inspection Program 8

III. THE COURT CAN PROPERLY ENTERTAIN ALL OF THE QUESTIONS IN THE PETITION FOR CERTIORARI 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Allen v. State Board of Elections
393 U.S. 544 (1969) 9

Barclay's Bank, PLC v. Franchise Tax Board
114 S.Ct. 2268 (1994) 2, 3

Chemical Waste Management, Inc. v. Hunt
504 U.S. 334 (1992) 1

City of Houston v. Hill
482 U.S. 451 (1987) 9

Hormel v. Helvering
312 U.S. 552 (1941) 9

Kraft General Foods, Inc. v.
Iowa Dept. of Revenue and Finance
505 U.S. 71 (1992) 3

Lebron v. National Railroad Passenger Corp.
115 S. Ct. 961 (1995) 10

Maine v. Taylor
477 U.S. 131 (1986) 2, 3

Oregon Waste Systems v. Dept.
of Environmental Quality
114 S.Ct. 1345 (1994) 1

United States v. Speers
382 U.S. 266 (1965) 9

TABLE OF AUTHORITIES (CONT'D)

Page

Cases

United States v. Williams
504 U.S. 36 (1992) 10

Virginia Bankshares, Inc. v. Sandberg
501 U.S. 1083 (1991) 10

Statutes and Regulations

Pub.L. 102-142, 105 Stat. 886 4

21 U.S.C. section 136a(a)(1)(A) 4

California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act, Cal. Food and Agriculture Code sections 5350-5353 7

Cal. Food and Agriculture Code
§5350 8
§5350(b) 8
§53503(e) 7

7 C.F.R. section 354.3(b)(1) 4

57 Fed.Reg. 14498, 14499 (1992) 4

I. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND MERIT REVIEW

Respondent's Brief in Opposition ("Br. Opp.") tries to recharacterize both the nature of the alleged discrimination in this case, and the basis for the California Supreme Court's decision below. The California Supreme Court invalidated California's agricultural pest inspection fee for foreign commerce solely on the ground that the fee statute facially discriminated against foreign commerce in favor of domestic interstate commerce. See Appendix to Petition ("Pet. App.") 1, 9, 17-18. The California Supreme Court did not find, and did not base its decision on the ground that California's inspection fee was invalid because it discriminated against foreign commerce in favor of intrastate commerce. In fact, the California Supreme Court expressly noted that this case was "atypical" because there was no contention that the challenged fee provisions "also favor California intrastate commerce." Pet. App. 18. (Emphasis added).

The California Supreme Court thought that the standards that apply in interstate commerce discrimination cases also should apply in this case. That is why that court thought that decision of this case was controlled by *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992), and *Oregon Waste Systems v. Dept. of Environmental Quality*, 114 S.Ct. 1345 (1994) -- two interstate commerce discrimination cases. The State contends that these interstate commerce discrimination standards should not apply in this foreign commerce case because: (1) there is no "economic protectionism"[1/] or discrimination in favor of intrastate commerce; (2) State inspection fees were used mainly to fund federal enforcement of federal agricultural pest laws;

---

1. By "protectionism", the State means state attempts to benefit in-state economic interests at the expense of out-of-state competitors by discriminating against interstate commerce in favor of intrastate commerce.

and (3) federal law creates the same fee discrimination against foreign commerce and in favor of interstate commerce which was found to violate the dormant Commerce Clause. The California Supreme Court thought that the above three characteristics were unimportant, and that the strict standards proscribing interstate commerce discrimination applied here notwithstanding these characteristics.[2/]

Thus, the principal issue decided below and presented in this petition is: Do the Commerce Clause tests that are applicable to state discrimination against interstate commerce in favor of intrastate commerce also apply in a case alleging discrimination against foreign commerce in favor of interstate commerce when the three characteristics described above are present.[3/]

This controversy over the applicable Commerce Clause standards implicates the Court's decisions in *Maine v. Taylor*, 477 U.S. 131 (1986), an interstate commerce discrimination case, and *Barclay's Bank, PLC v. Franchise Tax Board*, 114 S.Ct. 2268 (1994), a foreign commerce discrimination case. California readily acknowledges that when a State discriminates against interstate commerce and in favor of intrastate commerce, the "clear statement" rule of *Maine v. Taylor* applies in determining whether Congress

---

2. The California Supreme Court thought that it made no difference that the major portion of the State's inspection fees was transferred to the United States Department of Agriculture ("USDA") to enforce federal agricultural pest quarantine and inspection laws. Pet. App. 24. That court also attached no weight to the fact that federal law set up the same type of fee regime for foreign commerce as that established by the State. See Pet. App. 2-3.

3. We say this is the "principal" issue presented because the second question presented in the petition for certiorari is whether one can validly characterize California's fee distinctions as "facially discriminatory" given the different characteristics of the underlying foreign and interstate commerce inspections and inspection programs.

meant to authorize such "protectionist" state regulation. But California contends that in light of *Barclay's Bank, supra*, a different standard of congressional authorization applies when a state regulates foreign commerce and when the three characteristics or factors described above are present. Respondent disputes this interpretation of *Barclay's Bank* and contends that the "clear statement" rule of *Maine v. Taylor* applies to state regulation of foreign commerce like that in this case.[4/]

This issue is significant both because of its implications for Commerce Clause doctrine and federalism. California contends that there are different Commerce Clause policies and principles at work in different factual settings. Where there is no economic protectionism in favor of in-state interests and when federal law itself effects the very type of discrimination at issue, the dormant Commerce Clause should not exert the same restraining influence that it has when Congress has not acted in the field and when state regulation seeks to advantage in-state interests at the expense of out-of-state competitors. Both the California Supreme Court and respondent have failed to identify any underlying Commerce Clause principles and justifications why California's regulation is repugnant to the dormant Commerce Clause, other than the simplistic refrain that foreign commerce is a "federally protected class of commerce." Pet. App. 22; Br. Opp. 22. But that is the question: on the facts of this case, is foreign commerce

---

4. Contrary to respondent's suggestion, Br. Opp. 15-16, *Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance*, 505 U.S. 71 (1992) did not resolve this issue. In *Kraft*, Iowa's tax treatment was not exactly like that of the federal government. *Id.* at 74. ("Unlike the Federal Government. Iowa does not allow a credit for taxes paid to foreign countries.") Nor did *Kraft* have the level of federal authorization that is present in this case such as use of the challenged state fees in the enforcement of federal law pursuant to a cooperative agreement between the State and federal government.

"protected" by the Constitution when Congress obviously has not protected it but has, in fact, discriminated against foreign commerce in favor of interstate commerce by imposing inspection fees on the former but not the latter. Indeed, the doctrinal confusion is compounded by the California Supreme Court's suggestion that one of the ways to "remedy" the unlawful discrimination in this case is by imposing inspection fees upon interstate commerce seeking to enter California. Pet. App. 37. This truly inverts the "protected" classes of commerce. If anything, shippers in interstate commerce are the "protected" class because federal law prohibits collection of federal inspection fees from them. See Pub.L. 102-142, 105 Stat. 886; 57 Fed.Reg. 14498, 14499 (1992). Shippers in foreign commerce are the "unprotected class" because federal law requires the collection of inspection fees from them. See 21 U.S.C. section 136a(a)(1)(A); 7 C.F.R. section 354.3(b)(1). Yet, the California Supreme Court chastised the State for collecting inspection fees from foreign shippers (even though such shippers are not protected under federal law from fees), and urged California to impose fees on interstate commerce shippers, who are exempt from federal inspection fees. The fact that California subsidizes inspections for interstate commerce seeking to enter the State creates the kind of open access to a State's market that the Framers would have applauded. For the California Supreme Court to urge the State to start imposing fees on interstate commerce and close off this open access (ironically, in the name of the Commerce Clause) is a regressive step.

The importance of the issues in this case to federalism also should not be discounted. There is a long history of federal-state cooperation in agricultural pest eradication and control. The record in this case reflects the close relationship between USDA and the California Department of Food and Agriculture in a joint effort to protect the State and Nation from foreign agricultural pests that can cripple our agricultural economy. See e.g., Pet. App. 101-123.

Whether and to what extent the dormant Commerce Clause restrains such cooperation merits this Court's attention.

II. RESPONDENT'S CHARACTERIZATION OF THE STATE'S REGULATION IS INACCURATE

Respondent's opposition tries to recharacterize the nature of the State's regulation and the alleged discrimination in this case by arguing that: (1) this case really involves discrimination in favor of intrastate commerce and in-state economic interests; (2) the inspection fees collected from marine carriers are excessive and exceed the cost of the inspection services provided by the State; (3) money from the inspection fees was spent on domestic inspection programs and other state programs; (4) the inspection fees can be adjusted based on factors unrelated to foreign commerce inspection program costs. These claims are either unsupported by evidence in the record, or are disputed by the State and were not ruled upon below.

1. Alleged Intrastate Commerce Discrimination

Despite respondent's assertion that California's inspection fees discriminate in favor of intrastate commerce, the California Supreme Court did not rule that way, and did not invalidate the State's fee on that ground. In fact, both the California Court of Appeal and the California Supreme Court noted that respondent's challenge was predicated on alleged discrimination against foreign commerce and in favor of domestic interstate (not intrastate) commerce. See Pet. App. 9 (noting that Respondent's pleading alleged the fee scheme "imposes a discriminatory and unreasonable burden on carriers in foreign commerce that is not imposed on carriers in domestic interstate commerce, in violation of the federal commerce clause"); 17-18, 34 ("Pacific Merchant contends only that the Legislature's decision to impose an inspection

fee on foreign marine commerce but to provide free inspections for domestic interstate commerce at state taxpayer expense unconstitutionally discriminates against foreign commerce."); 46 (describing respondent's summary judgment motion).

Respondent also cites purported "facts" in its opposition in support of its intrastate commerce discrimination claim. These purported "facts" are neither contained in, nor supported by, the record.[5/] Having chosen to litigate its case on grounds of discrimination against foreign and in favor of interstate commerce, respondent should not be permitted to make factual allegations about alleged discrimination in favor of intrastate commerce that are unsupported by any record citation, and based on speculation.[6/]

---

5. See, for example, Br. Opp. 24 & n. 20 (purported facts about the extent of intrastate commerce and California-based businesses engaged in such commerce); 25 (purported facts regarding California trucking companies engaged in intrastate commerce). Nor has respondent cited to the record for any evidence that intrastate shipments of agricultural produce within California move by air or marine vessel, and are inspected locally within California but are not charged inspection fees. The fact that interstate ocean commerce is limited to United States citizens, Br. Opp. 8, hardly helps respondent's intrastate discrimination argument. If interstate ocean transport is open to all U.S. citizens, then non-California companies can engage in such commerce (and theoretically might be the only companies engaged in such commerce).

6. Insofar as respondent purports to challenge intrastate inspections conducted by California counties, its lawsuit only named State agencies or officials as defendants. No California counties are parties to this litigation; nor is there a complete factual record nor any factual findings by the courts below regarding the extent or circumstances of any intrastate inspections conducted by counties. Respondent's attempt to inject this issue into this case at this stage should be rejected.

2. Excessive Nature of the Foreign Commerce Fees

The California Supreme Court declined to address the issue of the alleged excessive nature of the State's fee, see Pet. App. 41, n. 16, and did not adopt as factual findings the various accounting manipulations which occupy much of respondent's opposition. See Br. Opp. 5-9. Inspection program costs and accounting allocations were partly in dispute. Consequently, the California Supreme Court made only limited factual findings about comparative costs of the interstate commerce and foreign commerce inspection programs. See Pet. App. 7-9, 35. Because respondent's other financial and accounting interpretations were not the subject of findings below, they should be disregarded.

Respondent's claim that the State conceded that its fee exceeded the costs of inspection, Opp. Br. 17, is not correct. The State has always maintained that the foreign commerce inspection fees were spent entirely on the foreign commerce inspection program. Pet. App. 99-100, 134. Respondent misleadingly equates the entire inspection program with one component of the program -- vessel inspections -- and leaves out other program components like the public information program, blitzes, etc.

3. Alleged Subsidization of Domestic Inspection and Other Programs

The California Supreme Court also made no findings, and did not invalidate the State's inspection fee on grounds that foreign commerce fees were spent on domestic interstate commerce inspections or other programs. The California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act, Cal. Food and Agriculture Code sections 5350-5353, ("the California Inspection Act") requires foreign commerce inspection fees to be used solely for purposes of the California Inspection Act. See Cal. Food and Agriculture Code section 5353(e). The California Court of

Appeal also noted that: "All fees collected support the air and marine inspection program and not the general fund; in fact, the program has a separate fund and line item in the budget from the rest of the Department." Pet. App. 51. California officials also stated that foreign commerce inspection fees were used solely for the California Inspection Act program. Pet. App. 99-100, 134.

Respondent also claims that the California Inspection Act, and specifically Food and Agricultural Code section 5350, apply to interstate or intrastate commerce, therefore the statute does not create a separate inspection program for foreign commerce. Br. Opp. 2-4. However, the California Supreme Court thought that section 5350 set up a foreign commerce inspection program. The California Supreme Court referred to the "statutory obligation under section 5350, subdivision (b), to provide for the inspection of ships carrying agricultural goods into California from foreign countries". Pet. App. 5. (Emphasis added). Because the California courts are the ones to construe California law, respondent's different characterization of section 5350 should be disregarded.

4. Adjusting Foreign Commerce Fees Based on Factors Unrelated to the Inspection Program

Respondent also suggests that the State adjusts the foreign commerce inspection fee based on factors unrelated to the foreign commerce inspection program. Br. Opp. 7 & n. 8. This is apparently another attempt to recast the inspection fee as a general revenue raising device which is used to subsidize other state programs. Again, neither the California Supreme Court nor the California Court of Appeal so concluded, nor did those courts adopt findings about the accounting manipulations upon which respondent's argument is based. When the State reduced its foreign commerce inspection fee, it continued to devote that fee to the foreign commerce inspection program which included the public

information program, funding of periodic blitzes, and cooperation with federal authorities on smuggling investigations. Pet. App. 7. Thus, fees continue to be used to assist in enforcement of federal inspection and quarantine laws for foreign commerce.

III. THE COURT CAN PROPERLY ENTERTAIN ALL OF THE QUESTIONS IN THE PETITION FOR CERTIORARI

Respondent contends that the congressional authorization issue cannot be included in the petition for certiorari because this specific theory was not argued below. Br. Opp. 12. While the State did not raise this specific congressional authorization theory in those terms, all of the necessary facts and elements of the theory were presented to the California Supreme Court. Thus, the California Supreme Court concluded that the fact that the State's inspection fees were used by USDA for its enforcement of federal agricultural pest laws was "without significance." Pet. App. 24. That court also recognized that federal law imposed agricultural pest inspection fees upon foreign commerce just like those collected by the State. *Id.* at 2-3. Thus, while the congressional authorization theory was not argued as such, the elements of it were noted or addressed by the California Supreme Court.

The Court has not applied an ironclad rule that theories not specifically raised below will not be entertained upon certiorari. See *Hormel v. Helvering*, 312 U.S. 552, 556-559 (1941); *United States v. Speers*, 382 U.S. 266, 277 (1965); *Allen v. State Board of Elections*, 393 U.S. 544, 554 (1969); *City of Houston v. Hill*, 482 U.S. 451, 467 n.16 (1987). Particularly where there are no unresolved factual issues which are a necessary predicate for the congressional authorization theory, it is not inappropriate to entertain this question in the petition. Because the State has always maintained that it did not violate the dormant Commerce

Clause, the congressional authorization theory is "not a new claim . . but a new argument to support what has been [the State's] consistent claim", and it consequently can be raised in the petition. *Lebron v. National Railroad Passenger Corp.*, 115 S. Ct. 961, 965 (1995). (Emphasis added). See also *United States v. Williams*, 504 U.S. 36, 40-43 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991).

CONCLUSION

The petition for certiorari should be granted.

Daniel E. Lungren
Attorney General of the State of California
Roderick E. Walston
Chief Assistant Attorney General
Charles W. Getz IV
(Counsel of Record)
Assistant Attorney General
Linus Masouredis
Deputy Attorney General

Counsel for Petitioners

May 1996